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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀοθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE SEVENTEENTH AND EIGHTEENTH CENTURY PRIVY COUNCIL IN ITS RELATIONS WITH THE COLONIES.

[*Contributed by* PROFESSOR H. E. EGERTON, *Beit Professor of Colonial History.*]

THERE seems a general agreement that the Dominions, or at least their most vocal representatives, resent their dependence, however nominal, on the Colonial Office. Their desire apparently is to be in direct contact with the Prime Minister; but hitherto British Prime Ministers, with the cup of their business already filled to the brim, have shown little inclination for this additional inflow. In this state of things the ingenious suggestion has been made that the connexion between the Privy Council and imperial affairs might be renewed by making the President of the Council the minister who should deal with Dominion matters. The aim of this article is to show what was the character of the authority exercised in times past over the colonies by the Privy Council.

In the first place, it may be noted that the superintendence of colonial affairs by the Privy Council was not the outcome of deliberate policy. On the contrary, when the Charter of 1606 claimed the sovereignty of some 2,000,000 square miles of American soil, it intended that there should be a special Council of Virginia, consisting of thirteen members, to "have the superior managing and direction only of and for all matters that shall or may concern the government as well of the said several Colonies as of and for any other part or place within the aforesaid precincts of four and thirty and five and forty degrees above mentioned."[1] Again, when by the Second Charter of 1609 the administration of the Colony was placed on a more businesslike footing, the theory of a separate Council was still maintained. "Forasmuch," it was said, "as the good and prosperous success of the said plantation cannot but chiefly depend, next under the blessing of God and the support of our royal authority, upon the provident and good direction of the whole enterprise by a careful and understanding Council, and

[1] A. Brown, *Genesis of the United States*, vol. i, p. 56.

that it is not convenient that all the adventurers shall be so often drawn to meet and assemble as shall be requisite for them to have meetings and conferences about the affairs thereof; therefore we do ordain, establish and confirm that there shall be perpetually one Council here resident, according to the tenor of our former letters patent." It would appear that there were really two royal Councils, one for the larger area claimed as English, and the other for the territory of the Virginia Company, stretching from 34° to 40° North Latitude. Of the fifty-two members of the Council for the Company, named in the Charter, fourteen were members of the House of Lords and about thirty of the House of Commons, and seventeen were members of both Councils.[1] In fact, however, the Council of Virginia, from the point of view of the Crown, proved a very weak reed on which to depend. "Whereas the Crown was formerly the source of all power, beginning with 1609 the Council of the Company, acting as a standing committee for the adventurers rather than in the name of the King, exercised the controlling authority. After the Charter of 1612 had provided for more frequent meetings of the generality, the Council was gradually superseded by special committees; and the tendency arose to decide all matters of importance in the general quarter Courts and to insist upon all communications being addressed to the Company rather than to the Council."[2] No doubt it was this "popularness"[3] of the Virginia Company that was the main contributing cause of its downfall, though the management of its affairs may have given some grounds for its suppression.

The failure of the Council of Virginia to act as a support for the Crown seemed to show that reliance must be placed on the long-established organ of the Constitution, the Privy Council. Henceforth, though stress was sometimes laid upon particular committees, and though more than one attempt was made to associate men possessed of expert knowledge with colonial administration, the general result was that the management of the Colonies remained mainly in the hands of the Privy Council, till its business was absorbed in the office of the Secretary of State, after the loss of the American Colonies. The functions of the Council, in respect to the Colonies, were threefold. In the first place, though other administrative boards dealt with plantation affairs—a state of

[1] A. Brown, *Genesis of the United States*, vol. i, p. 232.
[2] Kingsbury, *Records of the Virginia Company*, vol. i, p. 22.
[3] Nethersole, July 3, 1624, *Cal. of S.P.*, Col. Series, 1574–1660.

things which (as we shall see later) led to no little confusion and overlapping—it occupied a position of pre-eminence amongst such boards. Next, it acted as a Court of Appeal, with regard to cases brought from the colonial Courts; and lastly, after the royal provinces came to develop, it took the place of the Crown in giving or withholding assent to colonial legislation, thus becoming in effect a part of the legislative machinery of the Empire.

The two latter functions, however, required time for their development. At first, the work of the Privy Council was purely executive. It was the channel of communication between the King and the proprietors of Colonies, whether corporations or individuals. It received letters, petitions and reports, and responded to them by means of letters, warrants or orders. These latter were the ordinary form for giving effect to its decisions; and their position corresponded, within the sphere of the Executive, to that of statutes within the sphere of the Legislature. In order to arrive at a decision hearings were often necessary, which might take place before the whole Council or before a committee. The Colonial Series of the Acts of the Privy Council have been published in six volumes[1]; and, with regard to the period between 1613 and 1680, the editors record their conviction that "the present record of its activities gives a most favourable impression of the Council as a governing body, anxious to help, willing to take advice, free from preconceptions. Though necessarily giving over more and more of the routine work to various committees and commissions, it did not—during the period covered by this volume—become a mere recording body. Instructions were given to committees as to the lines on which they should proceed, and their reports were seriously discussed and, on occasion, altered. It was not afraid, on occasion, to change its decision on fuller information, or to make a handsome apology to a man unjustly censured. It showed a constant desire to help, and in every way endeavoured to promote colonial prosperity."[2] It should be noted that on the committees appointed by the Privy Council there were sometimes members who were not themselves Privy Councillors. Thus the Commission appointed in June 1624, after the cancelling of the Charter of the Virginia Company, to report with regard to the future government of the Colony, consisted of sixteen members, of whom only eight were members of the Council. Six were to form a quorum, "whereoff two to bee of His Majestie's Privie

[1] Ed. by W. L. Grant and J. Munro, 1908–12.

[2] *Ibid.*, pp. xi–xii.

Council." In April 1634 a Royal Commission was instituted, which was, in fact, a committee of the Privy Council, for "making laws and orders for government of English Colonies planted in foreign parts. With power to impose penalties and imprisonment for offences in ecclesiastical matters; to remove Governors and require an account of their governance, to appoint judges and magistrates, and establish Courts; to hear and determine all manner of complaints from the Colonies; to have power over all charters and patents; and to revoke those surreptitiously or unduly obtained." [1] If we compare the extravagance of these claims with the practical impotence which was their outcome, we can gauge the inefficiency of the then Government. It would be grossly unfair, however, to credit the normal working of the Privy Council system with pretensions such as these, which were the outcome of extreme political antagonisms. The Commission maintained a phantom existence till 1641; but, inasmuch as no machinery had been set on foot for enforcing its decrees, its results were practically *nil*. Under the Commonwealth the successive Councils of State and the Council of Trade performed the work of the Privy Council; and, with the Restoration, whatever break may have been made in other directions, with regard to the Colonies, there was continuity of policy. The same mercantile influence that dictated the economic policy, which found its formal embodiment in the Navigation Acts, sought to evolve a more direct and efficient system of colonial administration. Under the inspiration, probably, of Povey and Noell, active and influential merchants, who, under the previous regime, had gained the ear of Cromwell, side by side with a committee of the Privy Council appointed to sit twice a week "to receive, hear, examine and deliberate upon any petitions, propositions, memorials or other addresses which shall be presented or brought in by any person or persons concerning the plantations, as well in the Continent as Islands of America: and from tyme to tyme make their report to this Board of their proceedings," [2] there were appointed a Council of Trade, consisting of sixty-two members, and a Council of Plantations, consisting of forty-eight members. Such a system must have been cumbersome to work; and we are not surprised that, in spite of great activity at first, the Council for Plantations came to an end in 1665, colonial affairs becoming again the exclusive business of the Privy Council and its committees.

[1] *Cal. of S.P.*, Col. Series, 1574–1660, p. 178.
[2] *Acts of the P.C.*, 1613–80, p. 295.

In addition to its standing committee, the Council continued to appoint special committees to deal with special questions. Nor, when the whole system of standing committees was reorganized in 1668,[1] was this practice altered. Among the four standing committees was one for the business of trade, under whose consideration "is to come whatsoever concerns his Majesty's forraine Plantations." In the same year a Council of Trade was again set on foot, followed two years later by a Council of Plantations. These Councils proved themselves useful, the practice being for the Privy Council to refer to them questions of difficulty, and in most cases to follow their advice. Still, considering the close interconnexion between Trade and Colonies, there was little reason for the existence of separate Councils. It was, therefore, natural enough that the two bodies should have been, in 1672, united in one. The two years which followed were a halcyon time for colonial administration, the guiding spirit of the new Council being the able and keen Lord Shaftesbury, and its Secretary the philosopher, John Locke. Amongst its members were Evelyn and the poet E. Waller. From the *Diary* of the former we learn something of the working of this body. He admits us to a discussion wherein a hot debate took place on New England. He notes "the fear of their breaking away from all dependence on this nation," and "how some of our Council were for sending them a menacing letter which those who better understood the peevish and touchy humour of that Colony were utterly against."[2] That Charles II took a genuine interest in the Colonies is proved by the meeting-place being moved to Whitehall, "so that the King might come and sit amongst us and hear our debates." In 1674 the Council of Trade and Plantations was abolished and its work again transferred to a standing committee of the Privy Council. The motives actuating this change were possibly financial, the members of the Council having received salaries for their services; though, in any case, Shaftesbury's creation was not likely to have survived the fall of its maker. In effect, however, the change was not attended with evil results; and trade considerations in colonial administration continued to dominate. Indeed, as the mercantile interest grew stronger year by year, trade interests tended more and more to shape imperial policy.

Turning to the records of these years we find on more than one occasion the committee and the Council as a whole prompt to take up the case of Englishmen suffering wrongs in the West Indies at

[1] *Ibid.*, p. 457.

[2] *Diary*, May 26, 1671.

the hands of the Spanish or French authorities, and to recommend the measures necessary to protect their interests. Thus, "with regard to the negotiations with France concerning matters still in dispute between the English and the French Colonists in St. Christopher, the ambassador in France is instructed vigorously to insist that justice may forthwith be done to his Majesty and to his Subjects that are aggrieved concerning the said island." [1] Again: "Mr. Secretary Coventry is ordered to write to Sir W. Godolphin, his Majesty's ambassador at the Court of Spain, requiring him to acquaint that Court how his Majesty is pressed in this case (that of a ship illegally taken) and that the petitioners having made out that none but the Court of Spain are chargeable and ought to be responsible for the said injurys and losses; and that he do vigorously insist for satisfaction and let them know his Majesty hath under his consideration the granting of them letters of reprisall and must give effectuall order therein if speedy justice be not done them." [2]

As a general rule, the Privy Council was mainly occupied with the affairs of the royal provinces. With these its relations were inevitable and continuous, seeing that for them the King in Council was the highest depositary of executive power. The Chartered Colonies, on the other hand, moved for the most part on their separate lines, and it was only when their acts affected the King's interests or the prerogative that the intervention of the Privy Council became necessary.

Nevertheless, it was in its dealings with the corporate colony of Massachusetts that the Privy Council, during the last quarter of the seventeenth century, was best able to try its mettle. In its contest with the astute and determined Colony it started under a serious handicap. A Royal Commission, sent out in 1664, had ended in complete failure, and subsequent delay in vindicating the claims of the Crown added to the difficulties of the situation. It must be remembered that trade considerations, under the old colonial system, were always the dominant force. In noting the defective manner in which the Navigation Acts were enforced, and in suggesting their remedies, the Lords of Trade and Plantations, in 1677, added the significant words: "They have forborn to frame any rules for New England, as they do not conform themselves to the laws, but take a liberty of trading where they think fit, so that until his Majesty comes to a better understanding touching what degrees of dependence that Government will acknowledge to his

[1] *Acts of the P.C.*, Col. Series, 1613–80, p. 711. [2] *Ibid.*, p. 727.

Majesty . . . their Lordships have not thought fit to offer any rules for passes in that place, but conceive it fit for his Majesty's service that some speedy care be taken to come to a settlement and resolution in this matter which is of so great importance to trade." [1] Meanwhile the English agent in Boston advised, on his return home, the most drastic measures against the recalcitrant Colony. Whilst the Privy Council was in little sympathy with proposals for the use of force, as urged by Randolph, it may not unreasonably have arrived at the conclusion that the abrogation of the Charter was the only solution of the problem. "Although," wrote Mr. G. L. Beer, the eminent American historian, "the English statesmen were very far from approving of many of the political tenets of the Massachusetts theocracy, the movement against the Charter did not spring from any opposition to colonial self-government in itself, but from the conviction forced upon the home authorities that the uncontrolled manner in which the Colony was exercising its powers was becoming increasingly detrimental to the economic welfare of England and the Empire." [2]

The usual procedure of the Privy Council did not assuredly lend itself to the charge of undue haste. First, there was a petition or memorial from some individual, stating a cause of complaint, then the matter was referred to the Committee, and finally the subject again came up for the decision of the whole Board. Take, as an example, the proceedings in the case of Randolph's memorial, forwarded to the Committee of the Privy Council by the Secretary of State. Its first action was to send a copy of it to the two agents of the Colony, requiring them to appear and to answer the complaints. After hearing both sides, on the particular question of the non-recognition of the oath of allegiance, the Committee, without giving their formal assent to all Randolph's statements, contented itself with directing that such oath should be administered to all subjects of the Crown in the Colony. At last, in 1679, it was decided once again to put off a final settlement of the business and to allow the colonial agents to return home. The reason given was that "our Council hath been taken up with the discovery and prosecution of a Popish plot, and yet there appears little prospect of any speedy leasure for entering upon negotiations in your affairs, as is certainly necessary not only in respect of our dignity, but of your own perfect settlement." [3]

[1] *Cal. of S.P.*, 1677–80, pp. 15–16.
[2] Beer, *The Old Colonial System*, part i, vol. ii, p. 270.
[3] *Acts of the P.C.*, 1613–80, p. 841.

In spite of these strong words and the fact that the Massachusetts authorities, while using conciliatory language, failed altogether to satisfy the Crown's demands, the impression left upon one's mind, after reading the papers, is that but for the pertinacity of the indefatigable Randolph, who was now again in Boston, attempting, in the face of opposition from the whole community, to enforce the law, caution and procrastination would have once more gained the day. In the face, however, of a Report from the Attorney-General concerning the forfeiture due to the King, the Lords of Trade and Plantations could not but recommend that the Government of Boston be required to pay all such fines to his Majesty, with the other particulars of the Attorney's report; or that, upon their default, their charter be questioned by *quo warranto*, next Hilary term." [1] If we compare the strong language of a proposed letter to Massachusetts, drafted apparently just before the much milder document actually sent,[2] we shall realize the moderation that still characterized the English authorities, even at a time when moderation in English politics seemed at a discount. It must be confessed that the conduct of Massachusetts made it difficult to avoid strong measures. According to Randolph, "the King's continual favour to this people has heightened their contempt. . . . The King's letters are of no value here. Nothing will serve but bringing a *quo warranto* against this charter." [3] When at last the news of a writ of *quo warranto* being applied for brought the Colony to a more yielding disposition, it was still found that the agents, who had been dispatched to England, were without full powers, so that they could not speak in the name of their Government. In May 1683 the Lords again found fault with several abuses in the Government and told the agents that "the King had shown great patience in bearing with it so long." [4] Once more a *quo warranto* was suggested, as if it were a new proposal. In the June following the definite recommendation was made that the Attorney-General be ordered to bring a *quo warranto* against the Governor and Company.[5] There were difficulties, however, in the way of proceeding by *quo warranto*; and so the Attorney-General advised that a *scire facias* should be taken out to repeal the patent. In June 1684 there was an order of Chancery entering judgment against the Charter, if they did not come to trial next term [6]: a condition impossible of fulfilment. The judgment was accordingly confirmed in the following October.

[1] *Cal. of S.P.*, Col. Series, 1681–5, p. 77.
[2] *Ibid.*, pp. 129 and 128.
[3] *Ibid.*, pp. 216–17.
[4] *Ibid.*, p. 434.
[5] *Ibid.*, p. 447.
[6] *Ibid.*, p. 659.

From this one example we can form a fair estimate of the strong and weak points of the seventeenth-century Privy Council. On the one hand, it was cautious and fair-minded, and assuredly in no wise anxious to play the autocrat; on the other hand, its methods led to delay and procrastination; and, just as battles are seldom won by Councils of War, so, when action was urgent, government by committees is an unsatisfactory method of dealing with difficulties. The records of the Privy Council are positive proof that its members did not neglect or slur their work. Nevertheless, the fact remained that their resolutions led to little practical results, from the point of view of the mercantile interest, and the demand for a more efficient body was, in the circumstances, natural enough. Such a body was intended by the establishment in 1696 of a new Board of Trade and Plantations, which was forced on a reluctant Ministry by the majority of the House of Commons.[1] The claim that Parliament should have the nomination of the commissioners gave great offence to the King, who held it to be an invasion of the prerogative. The result was a compromise, which added new evils to the old ones. The business of the new Board, which was meant to supersede the old standing Committee of the Privy Council for Trade and Plantations, was merely to collect and to convey information; whilst executive power lay wholly with the Privy Council, or with the Secretary of State. If, indeed, the great officers of State, who were made permanent members of the Board, had regularly attended its sittings; and brought up to the Privy Council its recommendations for approval and execution, the mischief would have been met; but, in fact, too often the Board received the cold shoulder from the members of the Privy Council, and recorded their objection to the manner in which colonial matters were settled, without their advice being asked. According to a report of the Board, dated September 8, 1721: "The present method of dispatching business relating to the Plantations is liable to much delay and confusion; inasmuch as there are at present no less than three different ways of proceeding herein; that is to say, by immediate application to your Majesty by one of your Secretaries of State, by petition to your Majesty in Council and by representation to your Majesty from this Board. From whence it happens that no one office is thoroughly informed of all matters relating to the Plantations, and Secretaries' orders are

[1] *Parl. Hist.*, vol. v, p. 977; and Burnet, *Hist. of his Own Time*, 1833 ed., vol. iv, p. 294.

obtained by surprise, disadvantageous to your Majesty's service; whereas, if the business of the Plantations were wholly confined to one office, these inconveniences would be thereby avoided." [1]

The confusion and paralysis that were the outcome of several co-ordinate offices, such as the Treasury, the Admiralty and the Customs, having their separate correspondence with the Colonies, and from the unsatisfactory status of the Board of Trade, was emphasized by Thomas Pownall in the sixties of the eighteenth century. Pownall had been a successful and efficient Colonial Governor, and was the brother of John Pownall, the Secretary of the Board of Trade; so that he spoke with some authority. "The Board of Trade," he insisted, "should either be made what it never was intended to be, a Secretary of State's office for the Plantations, or be confined to what it really is, a committee of reference for examination and report, for stating and preparing business, while the affairs of the Colonies are administered solely by the King in Council, really acting as an efficient Board for that purpose. Somewhere there ought to be an efficiency, and in this Supreme Board is the proper residence of it. To place it here would be, really and in fact, the establishment of an administration for colony affairs." [2] At first, indeed, after the establishment of the Board of Trade, things worked smoothly, and its ordinary representations were dealt with in the same way as were reports from other committees of the Council. From 1722 onwards, however, all important Council business was transacted in committees; so that the King should only have to attend for the formal reports of the Council as a whole. These committees, it seems, were committees of the whole Council, and not special committees, appointed *ad hoc*; although the recurrence of different names for the various committees suggests, at first sight, an opposite conclusion. "Under George I this committee considered a much wider range of plantation business than it did during the preceding reigns. Practically all of the representations of the Board were referred to it by the Council, the only exception apparently being those for the appointment of Colonial Councillors. Petitions, complaints, memorials, etc., were regularly referred to the same Committee." [3] These were generally sent to the Board of Trade, the Committee confining itself to a decision on the facts, as reported by that body. The presence of the Secretary of State

[1] *Docs. relating to the Col. Hist. of N.Y.*, vol. v, p. 630.
[2] *The Administration of the Colonies*, 4th ed., 1768, pp. 26–7.
[3] Dickerson, *American Colonial Government*, 1696–1765, p. 92.

at the meeting of the Committee tended to minimize the importance of the Board of Trade on colonial questions.[1]

The entries in the Privy Council Register prove that the committees of the Council took their work very seriously, and were by no means puppets moved by the Board of Trade or by the permanent officials. With regard to the period between 1720 and 1745, the editors of the *Colonial Series of the Acts of the Privy Council* say: "Indeed the activity of the Privy Council through its committees, the very real share which it took in the work of administration, is perhaps the most real addition of this volume to our knowledge of the period."[2] Accordingly the proceedings of the Council became for the most part purely formal, its work being concentrated in the hands of such committees. Once a matter was delegated to a committee, "its powers of postponement were so great that it may almost be said to have had a suspensory veto." Any question which came before the Council, however formal, whether coming from the Secretary of State, the Board of Trade or a Government department, was invariably referred to a Committee, which again referred it to the Board of Trade. The Board of Trade, after investigation, reported to the Committee, which, in turn, issued its report for confirmation by the Council. Questions might be referred back by the Committee to the Board of Trade, or the opinion of the law officers of the Crown might be taken.

Further, the growing importance of the Secretary of State, whilst it tended to diminish the prestige of the Board of Trade, also reacted upon the position of the Privy Council. The Secretary was the most important and active member of that body; so that, so far as executive functions were concerned, its power became more and more absorbed by his office. Thus, when, under Halifax, further powers were given to the Board of Trade, it was by raising its president to the position of a Secretary of State; and, though this change was not permanent, it is significant that in 1768 the President

[1] It must be noted that a more favourable view of the relations between the Board of Trade and the Privy Council is taken by the American writer quoted above. "The whole machinery of the British Government for colonial administration," he writes, "included a Board of Trade to investigate, gather facts, and make recommendations, a committee of the Privy Council to act as a board of review, and a Court of appeals, both administrative and legal; and the Privy Council, meeting with the King, before which all final actions of importance were registered. This procedure was often slow in action, but the provision for appeals before registration, and even the necessity of registration, afforded all interests an opportunity to be heard, and in the long run it was better to sacrifice speed for fairness."—*Ibid.*, p. 104.

[2] *Acts of the P.C.*, Col. Ser. 1720–1745, p. vii.

of the Board was made a full Secretary of State for the Colonies, becoming thus wholly independent of the Secretary of State for the Southern department—a condition of things which continued until Burke's reforms involved Board of Trade, Committee of the Privy Council as an active force, and the new Secretary of State in a common destruction.

But though the executive functions of the Privy Council tended more and more to be taken over by the more efficient and convenient office of the Secretary of State, there was another side of its work which was not thoroughly crystallized till the eighteenth century. As a Court of Appeal the Privy Council in many respects anticipated the subsequent Judicial Committee of the Privy Council. The usual procedure was as follows: Appeals were generally from the decision of a Colonial Governor and Council, sitting as a Court of Appeal or Court of Chancery. In civil cases, an appeal to the Council lay when the property in question exceeded a certain sum, generally £500. After 1684 security to prosecute the appeal within a year and to abide by the decision of the Council was insisted on; and notice of appeal had to be given to the local Court within a certain time.[1] When the local Court purported to deny the right of appeal, it was necessary, in the first place, to petition the Council that, notwithstanding, an appeal should be allowed.

When the appeal was admitted, the Colonial Court was directed to send over sealed copies of all the proceedings; and, in some cases, their reasons for refusing leave to appeal.[2] Seven months or more were usually allowed for the necessary proceedings in the Colony; and, when these had been duly transmitted, the general rule was for the appellant to petition the Council for the hearing of his appeal. Such petition was referred to the Committee of Appeals, who fixed a date for examining the case, and, on hearing it, made a report which was usually followed within a few days by a formal order of the Council.

It became usual to mulct the unsuccessful litigant in a small sum as costs; and costs were sometimes also imposed when delays had been caused by the neglect or fault of one of the parties.

The Corporate Colonies of Connecticut, and Rhode Island, as well as Massachusetts, never admitted the right of the Privy Council to deal with cases from those Colonies; but the theory maintained by the English authorities was "that it is the inherent right of his Majesty to receive and determine appeals from all his Majesty's

[1] *Acts of the P.C.*, 1680–1720, p. xiii. [2] *Ibid.*, p. xiv.

Colonies in America ; [1] and there is much evidence to show that in the Colonies generally the administration of justice was such as to make an independent Court of Appeal, from the point of view of private rights, well-nigh indispensable.

An important branch of the work of the Privy Council has still to be considered. The approval or disallowance of Colonial statutes entailed no little trouble and responsibility. The Council was assisted by the advice of skilled lawyers amongst the most eminent of their profession. The records abundantly justify the statement that there can be no dispute that "the Committee went at length into the grounds of its action and exhausted every means of obtaining information upon the character and tendency of the legislation it condemned." [2] The decisions of the Committee were in many cases necessitated by the theory of trade embodied in British Acts of Parliament. Thus, the inclusion in any law of provisions inconsistent with the dominant conception of the trade relations between a country and its colonies, rendered its disapproval a matter of course. "Every attempt," it was recognized, "in the Colonies to check or interfere with the manufactures of this country ought in policy and reason to be discouraged and suppressed." [3] To such lengths was the doctrine extended that a North Carolina Act was disallowed "on the score of the prejudices to be apprehended to the landed interests and manufactures of Great Britain and Ireland from the emigration of the inhabitants to the American Colonies." [4] Much more justifiable was the consistent disallowance of colonial legislation which sought to remedy the scarcity of gold and silver coins by the issue of paper money. Unfortunately, British interference did not limit itself to such matters, and by its endeavour to confine growing democratic communities within the fetters of an oligarchical political system did much to bring about the future disruption. The Acts by which the Legislatures of Nova Scotia and New Hampshire respectively assumed to themselves a right of regulating and ascertaining the privileges and qualifications for electing and sending representatives to the General Assembly was disallowed "as interfering with the right which the Governor and Council have of issuing writs in your Majesty's name, which right forms, as we conceive, an undoubted branch of your Majesty's royal prerogative." A further objection was that "by empowering and qualifying a number of towns and parishes, either jointly or separately, to elect

[1] *Ibid.*, p. 328.
[2] *Ibid.*, Col. Series, 1766–83, p. xxv.
[3] *Ibid.*, p. 37.
[4] *Ibid.*, p. 340.

members to the General Assembly, they will (if suffered to be carried into execution) operate to the augmentation and increase of the representative body in each of these provinces, thereby leading to all those inconveniences which have been found to arise from the increasing greatness and disproportion of that branch of the Legislature." [1] Similarly, in the case of Massachusetts, Acts for erecting new townships were disallowed as leading to inconveniences arising from too great an increase of the number and influence of the representative body, and from a disproportion to the other branches of the legislature; and we could wish that some proper methods might be advised for limiting and restraining the general number of representatives." [2] (It should be noted that this Report was issued in the very year of the repeal of the Stamp Act.)

Such being the temper of British statesmen, even amongst the cautious and moderate members of the Committee of the Privy Council, what wonder was it that the many instances in which their interference tended to prevent public or private wrong called forth little recognition or gratitude in the communities affected?

In the detailed Report on Colonial legislation from which quotations have been given the Committee ended with a significant complaint with regard to the practice of colonial governors, in spite of the frequent admonitions from England, in dealing with laws passed by the colonial Legislatures. Too often they neglected to report for disallowance laws of an improper character and refrained from insisting on a suspending clause in the case of laws of a temporary nature, such laws consequently obtaining their full operation and effect before the Crown's pleasure with regard to them could be obtained. *Quis custodiet ipso custodes*, and the fact that the colonial governors were, in nearly every case, dependent upon their legislatures for their salaries made the position of the responsible authorities in England much more difficult.

The Instructions to Governors, issued along with their Commissions, need not detain us, because, for the most part, they recapitulated set forms; although changes in detail were constantly made dealing with new conditions as they arose. Attention should, however, be paid to the very different views with regard to these Instructions held in the mother-country and in the Colonies. The contention of the British authorities was that they had the force of laws and were binding on the Assemblies and the people

[1] *Acts of the P.C.*, p. 30. [2] *Ibid.*, p. 33.

no less than on the Governors. The Colonists, on the other hand, contended that, whilst they bound the Governor, the consent of themselves or their assemblies was required before they could bind them. The most careful and moderate of American historians asserts: "The power of the Crown in the Colonies never became sufficiently strong to override this claim, and therefore instructions must be considered to have been administrative regulations binding on the provincial executives, but operative on the Colonists and their assemblies only so far as the Governors could make them effective by influence and political action." [1] But if this was so, it is manifest how serious a limit was placed on the powers of the body claiming supremacy.

A further reflection is necessary before we leave the subject of this article. We have become so accustomed to the distinction between self-governing communities and dependencies, incapable of such government, that it is difficult to realize a conception of the Empire that regarded all its parts as on a common footing. Representative, without responsible, government was the form recognized for Massachusetts, but it was no less the form recognized for Barbados. Democracy to the British temper of the time was "monstrum horrendum, informe, ingens, cui lumen ademptum"; but, if oligarchy was in any case the only fit form of government, it mattered little whether the existence of a black population made it more exclusive than it would be in a white community. With this prevalent belief we have here only to do so far as it affected the position of the Privy Council; and, viewed from this standpoint, no doubt it simplified matters because it caused that the Empire with which the Privy Council had to deal was in theory—though here the divergence from fact portended future trouble—homogeneous; the pattern of the Board on which it played its game being deemed uniform.

It was not the character of the Privy Council itself that was at fault in its dealings with the Colonies, though no doubt the system was a bit cumbersome and lent itself to procrastination and delay. What was wrong, from the point of view of the preservation of the Empire, were the fundamental beliefs which the members of the Privy Council held no more and no less than the whole governing class in England. During the period with which we have been here concerned there were no Dominions, in the modern acceptation of the word; and there is nothing in the past history of the Privy

[1] Osgood, *The Am. Col. in the Eighteenth Century*, vol. i, p. 37.

Council to suggest that it would be a more suitable organ than the Colonial Office for dealing with the new nations that possess dominion status. Its associations with the past are those of interference and dominance, the very antithesis of the relations that now prevail. At present the Dominion department of the Colonial Office is practically independent from the rest of the office; and presumably it would be an easy matter to transfer its staff to another office and to provide the President of the Council with new work. But the practical question remains: would such a change meet the demands, largely sentimental, of the new nations? Assuredly there is nothing in the past history of the Privy Council to suggest a favourable answer. It will be remembered that, some years ago, complaint was made by eminent Australians that they were placed in an inferior position by appeals from their Courts going to the Judicial Committee of the Privy Council, instead of to the House of Lords. It is true that such complaint seems to have died a natural death with the strengthening of the Judicial Committee. Still, the fact that it could be made serves to show that in the minds of the people of the Dominions there is nothing sacrosanct in the associations connected with the British Privy Council.

THE STORY OF THE MANILLA RANSOM, 1762, AND BRITAIN'S DEBT TO THE UNITED STATES.

[*Contributed by* N. W. Sibley, Esq., B.A., LL.M.]

At a time when international finance is, and seems likely to remain, a question *brûlante*, it seems not irrelevant to recall that the non-payment of an old-time war indemnity, the Manilla capitulation ransom, 1761, in the language of Lecky, "bitterly offended the national pride."[1] Lecky and all historical authorities concur that the ransom has never been paid. The claim has never been renounced by the British Government, there has been no abandonment *sine spe redeundi*, and the trend of modern public international law on the subject of the Succession of International Persons seems to render it a plausible proposition that the United States have become liable to this country for the Manilla ransom, since they acquired the Philippines in 1898. The following seem to be the relevant issues.

Is the Recovery of an Inter-State Debt after 161 years forbidden by International Prescription?—The extent to which the great events of our time have affected even recent (though previous) views on international law on the subject of international prescription is best inferred from the fact that Oppenheim, writing in 1912, came to a considered conclusion that Prussia, Austria and Russia "have now a good title by prescription to territories which were formerly Polish."[2]

This assumption means that Poland was an extinct State in 1912, and, therefore could not be reconstituted, and it renders it impossible to construe the terms of the Treaty of Versailles. The reconstitution of Poland, after a century and a half of oppression, has dealt something amounting to a final blow at the doctrine of international prescription.[3] It is a remarkable fact that Phillimore,

[1] *Hist. Engl.*, vol. iii, p. 83.

[2] *Int. Law*, vol. i, Peace, p. 308.

[3] For an account of the three Partitions of Poland, designated by Sir Robert Phillimore as "grievous acts of national wickedness" (*Int. Law.*, vol. i, pp. 437–41). For Poland's restoration to "complete independence" see *Treaty of Versailles*, June 28, 1919; s. 7, Art. 87 *et seq.*

who unhesitatingly affirms the existence of international prescription, and writes on it with more detail than any other writer,[1] evidently did not consider that it applied to the case of Poland, because he did not include that country among extinct States like Wales, Scotland, Ireland, and Normandy and Brittany and other French provinces, when specifically discussing the status of extinct States.[2] Modern history has rendered it necessary to add to the list of extinct States the Transvaal and Orange Free State, the Austrian Empire and Montenegro. Phillimore treats the subject of international prescription as a difficult and delicate question[3] on which it is not possible to speak with the strictest accuracy, because it is at all events admitted that it is inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established. However, he concludes that it is in the highest degree irrational to deny that prescription is a legitimate means of international acquisition ; and that authority, practice, and usage, and the reason of the thing establish overwhelmingly that the doctrine of Prescription has place in international law. Grotius, Heinneccius, Wolff, Mably, Vattel, Rutherforth, Bynkershoek, Wheaton and Burke all contend, Phillimore observes, that prescription is a legitimate means of international acquisition.[4]

But it must be remembered that the date (1856) of Phillimore's *International Law* shows that his conclusions on the subject of international prescription could not have been supported by the findings of any international arbitration, and (also necessarily) took no account of the growth of the principle of nationality. One of the arguments in this great work on the subject of international prescription appears refuted by equally relevant and incisive arguments on other topics, but where the same principle is involved. Thus the inference that there is no such thing as prescription by international law because it is generally found in municipal codes is commented on as " very strange " (vol. i, 274). But much later on, when treating of the laws of war, Portalis is appealed to when he maintains that municipal law cannot be the source of international law, though the contrary may be true.[5] The doctrine that there is no such thing as international prescription because prescription is a positive rule of law in most municipal codes is

[1] Phill., *Int. Law*, vol. i, pp. 265–81.
[2] *Ibid.*, p. 147.
[3] *Ibid.*, ss. 255, 258.
[4] *Ibid.*, s. 257.
[5] *Ibid.*, vol. iii, p. 324.

strictly consistent with the position of the Stowell of France, Portalis, that municipal law cannot be the source of international law; there necessarily arrives a time when the analogy between the State and the individual breaks down.

On the other hand, Hall admits, writing thirty years after Phillimore, that the sense of the value of prescription has become diminished mainly through the influence of nationality.[1] Writing sixty years before the Great War, 1914–18, it might indeed have been contended that some such rule as international prescription was essential to the stability and peace of the world. But the tremendous events of our times have shown that the neglect of the principle of nationality is a far worse menace to the peace of the world and to that good understanding upon which all peace depends (to employ the language of the Covenant of the League of Nations), than any neglect of a rule of international prescription.

Lampredi (*Jur. Pub. Univ. Theorem*, p. iii, c. viii), De Martens (*Précis*, ss. 70–1) and Kluber (s. 6) deny the existence of prescription as between States, on the ground that prescription is not a principle of natural law, and that, there being no fixed term for the creation of international title by it, it cannot be said to have been adopted into international positive law. All these opinions are of course duly mentioned by Phillimore, whose great work is to be regarded, as Historicus observes, as "a digest of all the cases and authorities on international law."[2] But throughout the treatment of the subject Phillimore declines to draw any inference from the exact number of years being not fixed in the affairs of nations by international prescription. Hall mentions that another writer, Mamiani (p. 24), denies the existence of international prescription, though he only does so with reference to the relations of a dominant State to a subject population, an implicit anticipation of the resuscitation of Polish independence in 1919.

It is difficult not to conclude that the views of Lampredi, De Martens and Kluber have finally prevailed when it appears that international prescription was not mentioned at either of the two great Hague Peace Conferences of 1899[3] or 1907.[4] Phillimore treats international prescription as a fundamental postulate, "the main pillar upon which the security of national property and peace depends,"[5] and, even more significantly, says that it must be

[1] *Int. Law*, 7th ed., p. 122.
[2] Letters of Historicus: *Neutral Trade in Contraband of War*, p. 130.
[3] *Parl. Pap.*, 1899, Cd. 9534.
[4] *Ibid.*, 1908; Cd. 3857.
[5] *Int. Law*, vol. i, p. 276.

incorporated in the Code of International Law because "the peace of the world, the highest and best interests of humanity, the fulfilment of the ends for which States exist," require it.[1] He also cites Grotius as saying that any conclusion to the contrary is opposed to the common sense of nations, and Vattel as saying that it is the irrefragable basis of all right of succession.

But the fact remains that there was no mention of this great safeguard against war in any correspondence, protocol, convention or declaration, of the representatives of the twenty-six States who attended the First Peace Conference at The Hague in 1899, or of those of the forty-seven States who attended there, with the same object, in 1907. Even at the First Hague Peace Conference, attended by the representatives of twenty-six Independent Sovereign States, men's minds were beginning to be obsessed (with only too much reason) with ἄγλαα τέρατα πολέμοιο (*Il.* xi. 4) the Great War that was to break out fifteen years later. At the first Commission the Dutch representative, in a speech of great eloquence, declared Europe to be on the slope of an abyss and called on his brilliant and distinguished audience to "stand firm" (*Tenez ferme*) and make a united effort to prevent the outbreak of a terrible and universal war. The Conventions and Declarations passed at The Hague in 1899 were directed chiefly to its principal object, and those which dealt with humanizing war found a tragic epilogue in German atrocities during the Great War. No rule about international prescription, no doubt, could have found place in Conventions of this kind, though if it was the stay of peace, as has been contended, it might surely have been incidentally referred to in the Convention for the Pacific Settlement of International Disputes signed by the representatives of sixteen States at The Hague in 1899, consisting of sixty-one articles. However, no mention was made of it then, nor later, at the Second Hague Conference in 1907, when a much larger Convention on arbitration was concluded, signed by the representatives of forty-five out of the forty-seven States then in Conference. Again, some reference to international prescription might have been encountered in the Convention respecting the limitation of the employment of force for the recovery of contract debts (the Drago doctrine), which was signed and ratified at The Hague in 1907 by forty-five Powers.[2] But this Convention is equally silent on the subject of international prescription.

[1] *Int. Law*, vol. i, p. 275, s. 257.
[2] *Parl. Pap.*, 1908, Cd. 3857, p. 66.

The periods of prescription mentioned in Art. 300 (*a*) of the Treaty of Versailles, 1919, have obviously nothing to do with international prescription, but must relate to periods of prescription as fixed by the municipal codes of the Signatory Powers. These periods were directed to run " at earliest " three months after the coming into force of the Treaty.[1] In view of the fact that Vattel uttered a wish that the exact period of international prescription could be fixed " by universal consent of nations " it seems incredible that no attempt should have been made to do so at the greatest meeting of the nations that the world has ever witnessed before the Treaty of Versailles, 1919, if it really was a rule of positive international law. If it had been practicable the aspiration of Vattel might have at least found place as a *projet* or a *vœu* either at The Hague in 1899 or in 1907. But that it did not do so seems a sufficient reason for concluding that international prescription cannot now be considered a rule of positive international law.

In the case of the Pious Fund of the Californias Arbitration, 1902, instituted under The Hague Convention of 1899, for the Pacific Settlement of International Disputes, the arbitrators came to the conclusion that " the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between two States in litigation."[2] It is submitted that these words are general, and amount to a denial that international prescription is a rule of international positive law. It is true that Pitt Cobbett takes an opposite view, but the authorities he appeals to hardly support his opinion. Hall, for instance, as has been seen, attributes altogether a diminished importance to international prescription, and the silence of the two Hague Conferences on the subject entirely supports his view. Again, Pitt Cobbett quotes Westlake as maintaining its existence. But then Westlake would confine the rule about international prescription to merely affirming it as a mode of acquiring territory in new countries. This belongs to an altogether different order of ideas from a rule of international prescription, which should bar a claim to an obligation attaching to territory ceded by one State to another.

[1] By the Civil Code, the time of prescription is thirty years in the case of servitudes, cc. 690, 689, 706; ss. 2177, 2232, 2281. It is generally 6, 30, 40 years in Austria. In Prussia very long periods of time are required in certain cases to acquire property by prescription; 30, 40, 44, 50 years; see Phill., *Int. Law*, vol. i, p. 270.

[2] Pitt Cobbett's *Leading Cases on International Law*, vol. i, Peace, p. 23.

Westlake observes[1] that in 1803 the United States, during their dispute with Spain as to the boundary between Louisiana and Mexico, "broadly denied" prescription in international law, in a manner both unprecedented and unparalleled, by challenging all prescriptive titles acquired for 114 years in favour of the right of first discovery. Phillimore, quoting a parallel adduced by Savigny, argues that Prescription of Public Law must at all events take place in 118 years, though it is impossible to point out the exact year.[2] But, to revert to the action of the United States in 1803; since they virtually denied any rule of international prescription on that occasion, how could their representatives, at a hypothetical arbitration before the Permanent Court of Justice at Geneva, contend that that State could not be bound to pay the Manilla ransom, because it was barred by some rule of international prescription?

The subject of Prescription is not mentioned in a comprehensive work on International Law like that of General Henry W. Halleck. In the California case, the Mexican Government was ordered to pay the Government of the United States a debt due from the former for fifty-four years before the date of the award.

Are the United States now liable for the Payment of the Manilla Ransom to this Country, on the Principle of the Succession of International Persons?—This question raises the whole issue. It is necessary to distinguish between universal Succession and Partial Succession, the title of the United States to the Philippines is an instance of Succession of the latter kind, which (*inter alia*) applies to the special instance of one International Person acquiring a part of the territory of another through cession. Oppenheim concluded that there was no rule of international law that under such circumstances the successor State had to take over a corresponding part of the debt of its predecessor. But the last-named authority, nevertheless, admits that it would be "only just" if there was such a rule, and admits that many writers maintain that there is such a rule of international law.[3] Hall admitted the great difficulty of the subject, and complains of the want of any perspicuous pronouncement in any authority. He agrees with one inference from some statements from very

[1] *Int. Law*, pt. i, Peace, p. 105, note 4.

[2] Savigny and Phillimore conclude that the House of Hanover must have acquired the British throne by prescription at some date between 1689 and 1806, the date of the death of the last of the male Stuarts, the Cardinal of York.

[3] *Int. Law*, vol. i, Peace, p. 131.

authoritative sources.[1] That is, that "in the rare case of a State so splitting up that the original State Person is represented by no one of the fractions into which it is divided," the monetary obligations which had accrued to the whole before the division become rateably binding upon the different parts. The "rare case" has since occurred, on the most significant scale possible, by the "splitting up" of the original International Person of the Austrian Empire into four parts. The sequence of events in this case has completely vindicated the judgment of Hall, because the monetary obligations of the whole Austrian Empire have, by the Treaty of Peace signed at Saint-Germaine-en-Laye, September 10, 1919, become rateably binding upon "each of the States arising from the dismemberment of that Monarchy," by Art. 203 of the Treaty.[2]

These instances of passive succession have admittedly nothing to do with the present purpose, which is to establish the theory that by modern international law, as declared by all the great treaties concluded at the end of the Great War of 1914, there is passive succession with regard to the part of the territory ceded. However, by Pt. IX, Art. 186 of the Treaty of Trianon, June 4, 1920, each of the States to which territory of the former Austro-Hungarian Monarchy is transferred (Italy, Serb-Croat-Slovene, Czecho-Slovakia, Rumania), and each of the States arising from the dismemberment of that Monarchy (Czecho-Slovakia, Serb-Croat-Slovene, German Austria) including Hungary, shall, in so far as territory is assigned to it in accordance with the Treaty (of Trianon) assume responsibility for a portion of the debt of the former Hungarian Government which is specifically secured on railways and other property, and which was in existence on July 28, 1914, and there is also a corresponding liability for the unsecured bonded debt. Therefore, by the Treaty of Trianon, the distinction drawn by Hall and Oppenheim between the passing of the passive in cases of separation and partial cession has disappeared, it passes in both cases, a point of paramount importance both as regards the general law and the purpose of the present argument.

A further reference to the Peace Treaties amply justifies the position that it is a comprehensive and all but inflexible rule of

[1] Grotius, *De Jure Belli ac Pacis*, lib. ii, c. ix. s. 10; Kent *Comm.*, i. 25; Phill., vol. i., s. 137.

[2] More particularly, as to the proportion and nature of the financial obligations of the former Austrian Empire which the Czecho-Slovak State will have to assume, see Art. 58 of the Treaty of St. Germaine-en-Laye. As to the Serb-Croat-Slovene State see Art. 52.

modern international law that there is passive succession of International Persons in the case of partial cession. No doubt the question was long *apices juris*. In the seventh edition of Hall there was a very learned doubt expressed whether there were any instances of a conquering State taking over a part of the general debt of the State from which it has seized territory, except when the general debt of Denmark was divided between that country and Schleswig-Holstein in 1866, and when in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. The note in Hall (ed. 1917) adds that it was to be doubted whether any other cases had occurred.[1] But by Arts. 9, 33, 42 of the Treaty of Berlin, 1878, Bulgaria, Montenegro and Servia took over a portion of the Turkish debt.

But, in view of the fact that the great Treaties concluded at the end of the Great War, the treaties of Versailles, St. Germaine-en-Laye and Neuilly-sur-Seine (1919), Trianon (1920), and Lausanne (1923), which will presumably assert the security of the liberties of Europe, longer even than the Treaty of Utrecht, 1713,[2] everywhere proclaim the principle of passive succession, it becomes necessary to suppose all doubts on the subject have been finally solved. Usage and the reason of the thing are the best sources from which a writer on International Law can derive his propositions, according to Phillimore's judgment of Bynkershoek. Both now overwhelmingly support the view that there is passive succession in cases of separation or cession. What Oppenheim, in 1912, most properly conceded, "would only be just," is incontestably established as a rule of positive international law by a series of great treaties which contemplate a permanent arrangement of national and international rights, and contain an assertion of great principles relating to the balance of power and the security of the liberties of Europe as much as the Treaty of Utrecht,[3] 1713, held valid in its main aspects by M. Guizot and Lord Palmerston 133 years afterwards on the occasion of the Spanish marriages in 1846.

First, as to the enunciation of the principle that the passive succession passes in cases of the partial succession of International Persons by cession or separation by the provisions of the Treaty of

[1] *Int. Law*, 1917, p. 100, 7th ed.

[2] Phill., *Int. Law*, vol. iii, p. 674.

[3] *Cf.* the language of Phillimore about the Treaty of Utrecht, 1713; *Int. Law*, vol. iii, p. 675.

Versailles, June 28, 1919. By Art. 254 of the Treaty the Powers to which German territory is ceded undertake to pay both a proportionate part both of the German Empire and of the debt of the German State to which the ceded territory belonged. There are exceptions; but, as they are admittedly introduced as exceptions, they strengthen, and do not detract from, the above enunciations, of principles. Thus, by a sort of fiscal *lex talionis*, France is expressly rendered exempt from undertaking any portion of the burden of the German debt in respect of Alsace-Lorraine, because Germany in 1871 refused to undertake any portion of the burden of the French debt in that region. It is curious that this latter circumstance is not noticed in the very learned discussions in Hall and Oppenheim; but it would not have strengthened the conclusions of the latter that there was no rule of international law about passive succession in cases of cession. The provisions both in the Treaty of Frankfurt, 1871, and in the Treaty of Versailles seem to be instances of (in the language of Pitt) "treaties operating by exceptions." This conclusion seems indeed not so much permissible as necessary from the express language employed in both treaties. But assuming this, the principle of the Succession of International Persons is that the passive passes in cases of partial cession.

A clear instance of a conquering State taking over a part of the general debt of the State from which it has seized territory, occurring in the great Peace Treaty of Versailles is that, by Art. 86, the Czecho-Slovak State assumes the financial obligations of Germany and Prussia as regards the Silesian territory placed under its sovereignty. The Czecho-Slovak State was definitely recognized as an allied nation, the unity of whose armies waging regular warfare against Austro-Hungary and Germany was also recognized by the British Government by declaration, August 13, 1918.

By Art. 203 of the Treaty of St. Germain-en-Laye, September 10, 1919, between Austria and the Allied Powers, each of the States to which territory of the former Austro-Hungarian Monarchy is transferred assumes responsibility for a proportion of the debt of the former Austrian Government.

The conquering States to whom Austria ceded territory are Italy (Art. 36), and Rumania (Art. 59). As to the passing of the passive in cases of cession under the Treaty of Neuilly-sur-Seine, November 27, 1919, with Bulgaria, the Powers to which Bulgarian territory is ceded (*i.e.* the Serb-Croat-Slovene State, Art. 37; Greece,

Art. 47) by the treaty undertake to pay a contribution towards the Bulgarian Public Debt, including a share of the Ottoman Public Debt (Art. 141)[1]

Next, as to the devolution of passive succession under the Treaty of Lausanne, July 24, 1923, between Turkey and the Allies.[2] By Art. 46 of the Treaty, the Ottoman Public Debt is distributed between Turkey and (*inter alia*) the States to whom the islands referred to in Arts. 12 and 15 have been attributed. By Art. 12 a great number of islands (Imbros, Tenedos and the Rabbit Islands, Lemnos, Samothrace, Mitylene, Chios, Samos and Nikaria) are "attributed" to Greece by Turkey and by Art 15 Turkey "attributes" the following to Italy—Stampalia (Astrapalia), Rhodes (Rhodos), Calki (Kharki), Scarpanto, Casos (Casso), Piscopis (Tilos), Misiros (Nysiros), Calimnos (Kalymnos), Leros, Patmos, Lipsos (Lipso), Simi (Symi), and Cos (Kos), which are now occupied by Italy, and the islets dependent thereon, and also over the island of Castellorizzo.

A very relevant question arises whether, under the Treaty of Lausanne, July 24, 1923, Great Britain is bound to participate in the annual charge for the service of the Ottoman Public Debt contracted before November 1, 1914. The nomenclature of the superseded Treaty of Sèvres made it clear that this country was so bound, because she was a State in whose favour territory (*i.e.* the island of Cyprus), was detached from Turkey, "under the present Treaty," *i.e.* of Sèvres, (see Art. 241, s. 115 for the annexation of Cyprus).

But under the Treaty of Lausanne it is difficult, if not impossible, to see how Great Britain could fall under any of the three categories of States, which are bound to contribute to the service of the Ottoman Public Debt under Art. 46, as Cyprus is not among the islands above detailed in Arts. 12 and 15, and certainly cannot fall under the description of "a newly created State in territories in Asia" detached from Turkey under the Treaty. Lastly, the annexation of Cyprus had nothing to do with the Balkan wars in 1913. It, therefore, seems necessary to infer that the Treaty of Lausanne has relieved Great Britain of a fiscal liability in respect of Cyprus to which she was liable under the superseded Treaty of Sèvres. If this inference is correct, the acquisition of Cyprus by Art. 20 of the Treaty of Lausanne has thus furnished an instance of the passive

[1] *Parl. Pap.*, Treaty Series, 1920, Cmd. 522 pp. 98, 99, 120.
[2] *Ibid.*, 1923, Cmd., 1929, p. 35.

not passing in a case of International Succession. But it does not seem very clear that any inference can be drawn from the fact that the passive does not pass in the case of Great Britain's succession to Cyprus under the Treaty of Lausanne, because Cyprus was practically (though not legally) ceded to Great Britain in 1878.[1]

The broad fact remains as an established principle, as shown by the instances of Greece and Italy, that passive succession takes place under the Treaty of Lausanne as much as under the Treaties of Versailles, St. Germain-en-Laye, Neuilly-sur-Seine, or Trianon respectively. It is noticeable that Oppenheim treats it as equally a matter *apices juris* whether there is passive succession in cases of separation, as whether it takes place in cases of cession. But it is certain, only to take the very last instance, that there is passive succession under the Treaty of Lausanne, by s. 46 of which the Ottoman Public Debt is (*inter alia*) distributed among " the States newly created in Asia which are detached from the Ottoman Empire under the present Treaty " (this applies to Syria and Iraq, Art. 3, *Treaty of Lausanne, ibid., supra*).

There is also passive succession in cases of separation under the Treaty of Versailles in the instances of Poland (Arts. 92, 254) and Danzig (108, 254).

By Art. 5 of the Irish Free State Agreement (which has statutory force, 12 Geo. V, c. 4 (1922)), the Irish Free State assumes a proportionate liability for the Public Debt of the United Kingdom, the ratio to be decided by arbitration. The creation of the Free State affords an instance (*sub modo*) of what Oppenheim calls " a break-off " or separation, and, therefore, in this very conspicuous recent instance, usage solves the very learned doubt expressed by the latter as to whether the passive passed in this particular case of the partial succession of International Persons, besides the other recent instances arising in the great Peace Treaties.

Lord Macaulay, in analysing the language of a great constitutional tract, concludes a passage of great brilliancy by saying that whatever might have been the imperfections of its language, there were words in it which were to be taken as deeds, not as words.

In the same way treaty usage as shown by the provisions of the Treaties of Versailles, St. Germain-en-Laye, Neuilly-sur-Seine, Trianon, and Lausanne is now unanimously ranged on the side of the passing of the passive succession in cases of separation and cession.

[1] Oppenheim, *Int. Law.*, vol. i, p. 233.

The instances of treaties to the contrary in the past are to be regarded as isolated cases, and even less attention need now be paid to weighty reservations on the part of even the most learned writers, whose works do not deal with the Treaties of 1919 and 1923.

Thus Westlake, writing in 1910, concludes that as regards the passing of the passive in cases of the partial succession of International Persons, England reserved a large part for her discretion, though Italy adopted and acted upon a clear rule, that the passive passed.[1] But, as a signatory of the recent great Peace Treaties, which everywhere consecrate the principle that the passive passes in such cases, it is indeed difficult to see how England could continue the legal policy she acted on after the South African War.

It is submitted that Westlake is more favourable to the view that the passive succession passes in cases of partial cession than Oppenheim; though it is difficult to quote the latter against it since he admitted "it was only just." To the Treaties of 1866 and 1895, the opinion of Lampredi, De Martens, and Max Huber, there must be added the decisions of the Court of Cassation at Florence in 1877 and 1896, all in favour of the view that the passive succession passes in cases of partial succession.

In 1896, the Court of Cassation at Florence held that the Ministry of Finance was liable to contractors with the Austrian Government for the cost of erecting certain works of fortification about Venice, thirty years after the cession of Venice by Austria to France and its immediate retrocession to Italy by the latter Power in 1866.[2] The Court of Cassation laid down the true principle as being that, "by public law the State which succeeds in a part of the territory of another State is bound, independently of special conventions, by the obligations legally contracted by the latter in relation to the territory in which it succeeds."

Commenting upon this and an analogous decision in 1877, Westlake observes that "Italy, which may be taken as representing the most modern ways of thought and action, adopted a juridical rule (that passive succession takes place in cases of cession) and acted on it."[3] This was written in 1910, and the clauses of the five great Peace Treaties concluded respectively at Versailles, St. Germain-en-Laye, Neuilly-sur-Seine (1919), Trianon (1920), and Lausanne (1923) support at all hands the weighty judgment of

[1] *Int. Law*, vol. i, p. 81. [2] *Ibid.*, p. 80. [3] *Ibid.*, p. 81.

Westlake that the clear juridical rule laid down by the Italian Court of Cassation in 1877 and 1896 "represents the most modern ways of thought and action."

It seems, therefore, a highly probable inference in law that the passive succession of the Philippines including *ex hypothesi* the Manilla ransom, devolved on the United States when they acquired the Philippines in 1898. The Treaty of Peace was silent on the point whether the payment of twenty million dollars by the States precluded any claim against them for the passive succession of Spain, though they regarded it as having that effect.[1]

But the silence of the Treaty of Paris, 1898, goes entirely to the merits of the subject of this paper, whether the United States are responsible to this country for the payment of the whole, or a portion, of the Manilla ransom. The question of prescription apart, the whole trend of modern international law being that the passive passes in cases of separation or cession, the only course by which the United States could have escaped liability is by their having expressly stipulated at the Treaty of Paris that they repudiated the passive succession of Spain in Manilla, as they did in the case of Cuba.[2] The United States repudiated liability for the Cuban debt because it was not one incurred by Cuba, but by Spain, and settled by her on Cuba. However correct this reasoning may be, it cannot apply to the Manilla capitulation ransom, which was not a debt incurred by either the Philippines or Spain in fighting the United States. If the latter had desired to escape liability, it might be contended that her only safe course was to have acted as Germany did in 1871, and as France did in 1919, and to have expressly stipulated in the Treaty of 1898 that she took the Philippines "free and quit of all public debts."[3] According to the Treaties of Frankfurt and Versailles the United States appear, in the absence of any such stipulation, to be liable to this country for the Manilla capitulation ransom.

What is the Interest payable on a State debt due to Private Subjects of another State or to that State?—The United States supported their claim to the award of interest in the *Alabama* case by the following precedents. In the disposition by Sir Edward Thornton, British Minister at Washington, as umpire, of a claim on the part of the United States against Brazil, the umpire decided

[1] Westlake's *Int. Law*, vol. i, p. 85.
[2] *Ibid.*, vol. i, p. 85; Oppenheim, *Int. Law*, vol. i, p. 132.
[3] Art. 55, Treaty of Versailles.

that the claimants were entitled to interest by the same right which entitled them to reparation. And the interest allowed in this case was ($45,077) nearly half the entire award ($100,740). In like manner Sir John Nicholl, British Commissioner in the adjustment of damages between the United States and Great Britain under the Jay Treaty, awarded interest, observing: "To reimburse to claimants the ordinary cost of their property and all the expenses they have actually incurred, together with interest on the whole amount, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations for losses, costs and damages occasioned by illegal captures." [1] These arguments prevailed, though there were only two instances adduced by the United States of interest being conferred under an international arbitral award. But the reason seems clearly to be that international arbitration was in its infancy half a century ago. But these precedents seem, nevertheless, sufficient to establish from the point of view of usage that interest is payable on State debts recovered under an international arbitration. From the point of view of theory, Grotius considered interest legitimate,[2] and, adopting the argument of Sir Edward Thornton in the Brazil arbitration cited in the *Alabama* papers, it is submitted that compound interest is due by the same right as simple interest on the non-payment of the latter; and, therefore, if this country were to advance a claim to the payment of the Manilla ransom, it would be entitled to claim compound interest, which would, as has been seen, amount to 2,187 millions.

At the Geneva arbitration the United States claimed interest at the rate of 7 per cent., as being the usual legal rate of interest in the city of New York.[3] By the Award the four agreeing arbitrators came to the conclusion it was just and reasonable to allow interest at a reasonable rate.[4] But a gross sum was awarded (fifteen million dollars in gold), and the Award did not mention how this totality was arrived at, what the rate of interest allowed was, or whether it was compound interest or not.

In the case of the Pious Fund of the Californias Arbitration, 1902, 6 per cent. interest was recovered.[5] But this was not,

[1] *Parl. Pap.*, North America, No. 12 (1872), p. 164.

[2] There were, of course, ages in which this was contested (3 Stephen's *Hist. Cr. Law*, p. 194).

[3] Case of the United States to be laid before the Tribunal of Arbitration to be convened at Geneva (*Parl. Pap.* 1872, c. 476, p. 131).

[4] Award, etc., *Parl. Pap.*, 1873, c. 689, p. 5.

[5] Pitt Cobbett's *Cases on Int. Law*, 3rd ed., p. 23.

apparently, compound interest. No book on international law throws any light on the payment of compound interest in international disputes; but it seems clear that this country is liable to pay compound interest on the American debt, if default is made in the payment of interest, and that, as a consequence, it is actually, *sub modo*, paying compound interest.[1]

If, at the hearing of a supposititious arbitration for the payment of the Manilla ransom, Great Britain claimed the same rate of interest as the United States claimed at Geneva in 1873, the totality would, at simple interest at 7 per cent., amount to either £12,270,000 or £6,135,000, according as to whether the historians decide that half the million ransom was paid on the spot at the time or not. But in either case the sums above mentioned exceed any sum that has ever been recovered under the award of an international arbitral tribunal. At the lowest estimate, the amount Great Britain would receive under a supposititious favourable award on the subject of the Manilla ransom, whether the award was delivered at Geneva or at The Hague, would be more than double the amount recovered under the *Alabama* award. If compound interest was allowed at 5 per cent., as has been seen, the totals would be 2,187 millions or half that sum (according to half the ransom being paid on the spot or not).

Generally in Conclusion.—A circumstance that seems in principle of great importance at the present time, as it is a direct precedent for release from the costs of a war granted by a belligerent to his enemy by the express provisions of the Treaty of Peace, is the following:

In 1883, by a Treaty of Peace and Acknowledgment (Reconnaissance) of Debt between Paraguay and Uruguay, the former agreed to pay the costs of the war waged between the two countries in 1865, which amounted, however, only to 3,690,000 piastres (about £38,800). But the principle remains, and by a succeeding article of the same treaty, Uruguay released Paraguay from her obligation out of sympathy with her and in order to render homage to the Union (*confraternité*) of South America; but Uruguay reserved a right to compensation for losses incurred as a consequence of the war of 1865 by her own nationals and other persons enjoying

[1] In noticing the fact, in his Budget speech, that the dead weight of the National Debt had increased by £97,000,000, Mr. Baldwin observed that this was partly due "to the inclusion in the capital of our Debt of the arrears of interest due on our debt to the United States" (*The Times, Parl. Rep.*, April 17, 1923).

her protection.[1] The great Treaty of Peace does not draw the distinction encountered in the above Treaty and elsewhere between the expenses of a war (*frais de guerre*), and compensation to the nationals of a conquering State who have suffered by the war. Germany is only bound to make reparation,[2] and not required to pay the costs of the war. But this cancellation of the costs of a war requires on other grounds to be distinguished from the events of our time, because now associated ex-belligerents, so far from remitting debts due from late allies, are pressing for payment. The continental confraternity which, in another hemisphere, inhibited the exacting of the costs of war from an enemy, does not now avail to prevent one ally demanding such a payment from another!

History has indeed taught us little if anything but the most adverse inferences are drawn from the exaction of the costs of war by one ally from another. This is shown by the relations between France and Spain (1795–1813) when Napoleon demanded huge payments from Spain for the costs of his wars. Vattel urges that necessity may cast a veil even over inhumanity in war, and even that it may dispense with it. But necessity makes an equally clamant appeal to a commercial people like ourselves to preserve its export trade, now diminished by 35 per cent. from the pre-war standard.

The United States after their Civil War were, *sub modo*, in the same position as this country to-day, and the inflation of paper currency was a peril that was at least apprehended; but nevertheless they, for ten years, urged the *Alabama* claims, and, though they ultimately procured an award in their favour, the decision was only grounded, according to Sir Alexander Cockburn, on the maxim *ex facto jus oritur*, which may be pushed too far. In the arguments Sir Alexander Cockburn repeatedly inquired of the United States' advocate whether the authorities could have ordered troops to fire upon the *Alabama* as she was going out of the Mersey.[3] But though the question was put in a concrete form, he was unable to obtain any reply, which shows that none could have been made. It is submitted, on the above arguments, that the case of Great Britain for the payment of the Manilla ransom is in law a much stronger one than that of the United States at Geneva in 1873.

[1] *Parl. Pap.*, 1908, Cd. 4081, p. 528.
[2] *Treaty of Versailles*, 1919, pt. viii.
[3] *Parl. Pap.*, 1873, *Protocols*, etc., p. 139.

THE UNIFORM ILLEGITIMACY ACT AND THE PRESENT STATUS OF ILLEGITIMATE CHILDREN.

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It was realized at an early date in the history of the English law that society could not evade the problem of the illegitimate child merely by refusing to accord it legal recognition. The task of furnishing sustenance to children born out of wedlock must be placed either on the individuals responsible for its presence, or on social agencies. Hence an English statute of 1575 [1] provided that when a bastard was born in any parish, the local justices of the peace, at their discretion, might order the child to be kept by the public authorities, and compel either the mother or reputed father to contribute at regular intervals to its support. Commitment to prison was authorized for failure to abide by the order of the justices. The statute was imperfect in its details, but it substantially incorporated the provisions of most "illegitimacy" legislation up to the present day, including the Uniform Illegitimacy Act, which had been adopted in four States.[2]

The term "illegitimacy legislation" has two distinct meanings, each sanctioned by professional usage. In its broader sense it refers to all enactments relating to the rights of the child, the duties of the parents and the relations of both to the community. In its narrower sense it is co-extensive with the term "bastardy law," viz. statutes compelling the parents to support the child. The Uniform Act is of this narrower scope, dealing exclusively with the compulsory support of the child.

Section 1 lays down the morally obvious proposition that the parents of the child born out of wedlock owe the child necessary maintenance, education and support; and also imposes on the

[1] (1575–6) St. 18 Eliz., c. 3.

[2] Nev., Laws 1923, c. 87; N. Mex., Laws 1923, c. 32; N. Dak., Laws 1923, c. 165; S. Dak., Laws 1923, c. 295. For modifications of the original Act made by the adopting States see 9 Green, *Uniform Laws Annotated* (Supp. 1924), pp. 15 *et seq.*

father a liability to pay the necessary expenses of the mother's pregnancy and confinement. But, although this section premises a duty on both parents, the enforcement of the mother's duty is not provided for, since the remaining sections deal exclusively with the remedies to be employed against the father. S. 1, however, does provide that the liability of parents to support a child, under the laws for the support of poor relatives, shall apply to children born out of wedlock.[1] Thus the mother's duty, under the Uniform Act, depends on collateral local legislation in each of the States which adopt it, and no uniformity is obtained in this respect. In New York,[2] when the mother of a bastard possesses property she is subject to an order for support. In view of the growing economic independence of women, it would seem that a woman who is capable of earning a livelihood should share the expenses of her natural child's maintenance, just as the woman who possesses property. Under the Norwegian law,[3] which is probably the most enlightened legislation extant on the subject of illegitimacy, the child is entitled to be supported according to the economic situation of the more favourably situated parent. The Swiss law [4] declares that, where the child lives with the mother, the latter's obligations are exactly the same as though the child were legitimate.

The duty of the mother under the Uniform Act, although not directly enforceable by its drastic penal provisions, is to a certain extent given a sanction by s. 2, which limits the mother's recovery from the father to a reasonable share of the child's support. However, the provisions of s. 3, giving a cause of action against the father to third persons who have supported the child, do not mention any liability of the mother to such third persons.

Ss. 6 to 27 are devoted to a description of the procedure to be taken to compel the father to perform his duty. The remedies provided by the Act are not exclusive, however, s. 6 expressly providing that other proceedings hitherto available on principles of law or equity shall continue to do so. The action to compel

[1] A similar provision is contained in the Iowa statute. Comp. Code (1919) ss. 3273–4.

[2] N.Y. Code Crim. Proc. (Bender 1924), ss. 839, 857.

[3] Lov om barn hvis foraeldre ikke hind indgaat egteskap med hverandre (Law on children whose parents have not married each other) (1915) s. 2. For an English translation of the Norwegian law see Magnusson, *Norwegian Laws Concerning Illegitimate Children* (1918) U.S. Dept. of Labour, Children's Bureau, Bur. Pub. No. 31.

[4] Schweizerisches Zivilgesetzbuch (1907) s. 324. See Freund (1918) U.S. Dept. of Labour, Children's Bureau, Bur. Pub. Nos. 42, 254, 256.

support may be commenced by the mother, or, in the event of her death or disability, by the child through its guardian. The public authorities are permitted to take advantage of the proceeding only where it appears that the child is likely to become a public charge. Therefore, if the mother prefers not to compel support by the father, and is able to pay for the child's maintenance, the episode is never brought before the Courts. Under the New York law,[1] where the birth of a child out of wedlock is brought to the attention of the district poor officer, he must apply to a justice of the peace or magistrate to inquire into the facts of the case. The Norwegian law[2] compels the mother to consult a physician or midwife at least three months before she expects delivery, and to reveal to such person attending her when she became pregnant, and by whom. The physician or midwife must then report these disclosures to the proper local office.[3] Furthermore, parents, employers, or others in a similar position, who have reason to suspect the woman's pregnancy, must urge her to proceed according to law.[4] The German law[5] resembles the Uniform Act, in that control of the proceeding against the father is left with the mother or guardian. The policy of the Act, in compelling proceedings only when the child is likely to become a public charge, seems wise, since it may happen that the mother or her family would prefer to bear the entire burden of support rather than suffer the publicity surrounding a bastardy action. If the interested parties are financially able to maintain the child there is no reason why their desire should not control.

After complaint has been duly made[6] s. 12 provides that the action may be commenced either by summons or warrant, at the option of the complainant. A preliminary hearing is held upon return of process, and, if probable cause appears, the defendant is bound over for trial, or, in the absence of adequate security, committed to jail.[7] In this respect the procedure resembles that of a criminal action. But s. 16 provides that the trial is to be conducted "as in other civil cases." Either party may demand trial by jury. Jury trial

[1] N.Y., Code Crim. Proc., *supra*, foot-note, p. 34, s. 840. See also Ga., Ann. Code (Park, 1914), s. 1330.

[2] *Supra*, foot-note, p. 34, s. 6, par. 1.

[3] *Supra*, foot-note, p. 34, s. 6, par. 3.

[4] *Supra*, foot-note, p. 34, s. 6, par. 6.

[5] Burgerliches Gesetzbuch, ss. 1708–16. See Freund, *op. cit.*, foot-note, p. 34, pp. 249–50.

[6] Ss. 8–11 deal with the time, place, form, and substance of the complaint.

[7] S. 14.

is granted in most of our States in bastardy proceedings,[1] but in New York[2] and in Massachusetts[3] trial is held as in misdemeanour cases, in inferior Criminal Courts, without a jury.

S. 21 provides for judgment against the father for the payment of annual amounts until the child reaches the age of sixteen years. The most noteworthy feature of this section is that it apparently gives the Court unlimited discretion in fixing the actual amount to be paid at some figure consonant with the economic situation of both parents. S. 27 provides that the Court may vary the sum from time to time. This is a decided improvement over statutes which place a maximum limit on the father's obligation.[4] Reasonable contribution by the father is the standard adopted in Massachusetts in 1921.[5] Under the Norwegian law the child's maintenance is made dependent on the economic situation of the wealthier parent.[6]

Although the proceedings under the Act are largely based on notions of civil rather than of criminal procedure, ss. 28 and 29 make it a misdemeanour, punishable by a fine of one thousand dollars and imprisonment for one year, for the father to fail to support the child or to comply with a judgment for support, without lawful excuse. S. 28 also provides that failure to support the child when it is in the custody of either parent shall be governed by the laws applicable to the failure to support a legitimate child, thus subjecting the mother to the penalties provided by local legislation. The criminal sections of the Act are highly desirable, inasmuch as they give the Courts a weapon effective against the irresponsible defendant, who cannot be reached by the less persuasive devices of civil procedure.

The only other noteworthy feature of the Act is the provision of s. 35 that the relation of the mother and child shall not be described

[1] *E.g.* Ariz., Laws 1921, c. 114, s. 2; Ill., Laws 1919, p. 422, s. 4, as amending Rev. Stat. (1917), c. 17; Neb., Comp. Stat. (1922), s. 278; N.J., Comp. Laws (1910), pp. 184, 185, s. 6.

[2] N.Y., Code Crim. Proc., *supra*, foot-note, p. 34, s. 850.

[3] Mass., Gen. Laws (1921), c. 273, s. 11.

[4] In some States the amounts are obviously inadequate. N.C., Laws 1921, c. 109 (single payment of $250); S.C. Crim. Code (1922), s. 707 ($25 per year for twelve years); Ark., Dig. Stat. (Crawford, 1921), s. 777 ($1 to $3 per month until the child reaches the age of seven).

[5] Mass., Gen. Laws (1921), c. 273, s. 15, superseding an earlier statute which gave the illegitimate child the same claim against the father as legitimate children. Mass., Laws 1913, c. 593, s. 6. The modification enacted in 1921 seems of doubtful value.

[6] *Supra*, foot-note, p. 34.

in public records in such terms as to make the illegitimacy obvious. Although there is undoubtedly a policy in keeping the records of public proceedings open to the public, there are situations where social considerations demand secrecy. Analogous to s. 35 are the statutes of several States, which allow the presiding judge to bar the public from trials involving bastardy and sexual offences.[1]

In its regulation of procedure, the Act provides no rules of evidence or of competency of witnesses for trials held under it, except the general provision that the trial shall be conducted as in ordinary civil cases. In this respect, therefore, no uniformity is obtained among the States adopting the Act. Presumably, if the Act repeals all prior bastardy legislation, a preponderance of the evidence, as found by a Court or jury, will be sufficient to charge the defendant with paternity. Under the Massachusetts law,[2] which makes it a misdemeanour to beget an illegitimate child, it would seem that the prosecution must establish paternity beyond a reasonable doubt. In England[3] it is provided that the uncorroborated testimony of the woman is insufficient to charge the putative father. The same rule has been enacted in Oregon.[4] A difficult situation arises where the woman has been promiscuous at the approximate time of conception, so that any one of a group may be the father of her child. In such a case, it is next to impossible to prove by the standards of evidence in either civil or criminal litigation that one of the group, to the exclusion of the others, is the father of the child. The Act makes no specific provisions for such a situation. In Louisiana[5] general unchastity of the woman defeats any proceedings. France,[6] Germany[7] and Switzerland[8] have similar enactments. The Norwegian provision is novel.[9] Where the mother admits having had intercourse with several parties at the period of time when conception probably occurred, all of them are liable to be charged for the maintenance of the child.

[1] N.Y., Ann. Cons. Laws (2nd ed. 1917), c. 30, s. 4. For similar provisions based on considerations of delicacy see Mich., Comp. Laws (1915), p. 5408, c. 267, s. 1 (15700); Minn., Gen. Stat. (1913), c. 17, as amended by Laws 1917, c. 210, s. 3225 (e).

[2] *Supra*, foot-note, p. 36.

[3] (1872), St. 35 & 36 Vict., c. 65, s. 4.

[4] Ore., Laws (Olson, 1920), s. 2554.

[5] La. Rev. Civ. Code (Saunders, 1920), s. 210.

[6] Civil Code, s. 340. Freund, *op. cit.*, foot-note, p. 34.

[7] Burgerliches Gesetzbuch, s. 1707. See Freund, *op. cit.*, foot-note, p. 34.

[8] Schweizerisches Zivilgesetzbuch (1907), s. 315. See Freund, *supra*, foot-note, p. 34.

[9] *Supra*, foot-note, p. 34; s. 17, par. 1.

This is the most intelligent disposition of the situation, since the purpose of illegitimacy proceedings is to protect the child and the community, not the mother. The Louisiana type of legislation prejudices the State and the child, because of the mother's immorality.

Within its rather limited sphere, the Uniform Illegitimacy Act is a well-drawn statute; but it is restricted in scope of bastardy proceedings, and the important topic of the legal status of the child in relation to its parents, its collateral relatives and society in general, is not treated. If there is need for uniformity among the States in bastardy procedure, *a fortiori*, uniformity would be desirable in regard to such questions as the natural child's capacity to inherit and transmit property, its rights and those of its parents under wrongful death statutes, workmen's compensation laws and similar problems. Of course, it might be argued that if the Act attempted to be too comprehensive in the changes proposed there would be considerable hesitation on the part of conservative legislatures in adopting it. But, in our times, few intelligent people adhere to the obsolete notion that illicit intercourse is discouraged by casting a stigma on its offspring. Arizona [1] is the pioneer in abolishing distinctions between children born in and out of wedlock, its statute providing that every child is a legitimate child of its natural parent, and may inherit and transmit accordingly.

In most of our States, the illegitimate child has at least a limited right of inheritance from its mother, and may transmit inheritance to its maternal relatives.[2] In practically all States also, the illegiti-

[1] Ariz., Laws 1921, c. 114, s. 1.

[2] Ala., Civ. Code (1923), ss. 7371–2 (full inheritance from mother and transmission on mother's side); Alaska, Comp. Laws (1913), ss. 597–8 (inherit from mother but do not represent her in inheriting from collaterals); Ariz., *supra*, footnote, p. 38; Ark. Dig. Stat. (Crawford, 1921), s. 3473 (full inheritance and transmission *ex parte materna*); Cal. Civ. Code (1923), ss. 1387–8 (inherit from, but do not represent mother; transmit to mother and her heirs); Colo., Comp. Laws (1921), ss. 5158–61 (inherit and transmit *ex parte materna*); Del., Rev. Code (1915), ss. 3087, 3087a (transmit to mother and maternal collaterals; inherit from mother); Dist., Col. Code (1911), ss. 387, 958 (inherit from and transmit to mother generally, except that they do not take real estate from mother if at the time of her death she was incapable of making a will); Fla., Rev. Gen. Stat. (1920), s. 3615 (inherit and transmit *ex parte materna*, as if legitimate); Ga., Ann. Code (Park, 1914), ss. 3029–30 (inherit from mother and other illegitimate children of mother, transmit on mother's side); Hawaii Rev. Laws (1915), ss. 3248–9 (inherit from mother as if born in lawful wedlock; transmit to mother and maternal collaterals); Idaho, Comp. Stat. (1919) ss. 7794–5 (inherit from mother, but have no right of representation; transmit to mother); Ill., Rev. Stat. (Cahill, 1923), c. 39, s. 2 (take from mother and may represent her, transmit on maternal side); Ind., Ann. Stat. (1914), ss. 2998–3002 (inherit and transmit on maternal side as if legitimate); Iowa Comp. Code (1919), s. 7915

mate child can inherit and transmit on the paternal side, if the father has "acknowledged"[1] the child, or makes it legitimate by subsequently marrying the mother.[2] The only reason for requiring an acknowledgment by the father in order that the child

(mutual inheritance between mother and illegitimate children); Kan., Rev. Stat. (1923) c. 22, s. 121 (mutual inheritance between mother and illegitimate children); Ky., Stat. (1915), s. 1397 (transmit *ex parte materna*; no provision for inheritance); La., Rev. Civ. Code (Saund. 1920), s. 917 *et seq.* (peculiar distinction between "natural children" and bastards conceived in adultery or incest; former have qualified right to inherit, latter have none); Me., Rev. Stat. (1916), c. 80, s. 3 (makes illegitimate child heir of the mother); Md., Code (Bagby, 1911) Art. 46, s. 30 (illegitimate children may inherit from mother and from each other; may transmit to mother and her heirs); Mass., Gen. Laws (1921), c. 190, ss. 5, 6 (inherit from mother and maternal ancestors; transmit *ex parte materna*); Mich., Comp. Laws (1915), ss. 11796–7 (inherit from mother only; transmit on mother's side); Minn., Gen. Stat. (1913), c. 74, ss. 7240–1 (inherit from mother only; transmit to mother and her heirs); Miss., Ann. Code (Hemingway, 1917), s. 1387 (inherit from mother, mother's other children, and maternal collaterals); Mo., Rev. Stat. (1919), s. 311 (bastards may inherit and transmit on mother's side); Mont., Rev. Code (Choate, 1921), ss. 7074–5 (inherit from mother but do not represent her; transmit on maternal side); Neb., Comp. Stat. (1922), ss. 1228–9 (inherit from mother but not from collaterals; transmit *ex parte materna*); Nev., Rev. Laws (1912), ss. 6117–8 (inherit from mother as though born in lawful wedlock; transmit on mother's side); N.H., Pub. Stat. (1901), c. 196, ss. 4, 5 (inherit from mother equally with legitimates; transmit on mother's side); N. Mex., Ann. Stat. (1915), ss. 1850–1 (mutual inheritance between mother and illegitimate children); N.Y., Ann. Cons. Laws (Birdseye, 1917), vol. ii, c. 13, ss. 89, 98, pp. 1788, 1798 (inherit from mother only if there is no lawful issue; transmit to mother); N.C., Cons. Stat. (1919), c. 29, s. 1654, rules 9, 10 (illegitimates of same woman next of kin to mother and to each other; inherit from mother except in case of realty conveyed to her by father of legitimate children; no inheritance from collaterals; transmit *ex parte materna*); N. Dak., Comp. Laws Ann. (1913), ss. 5745–6 (inherit from mother but do not take by representation; transmit on mother's side); Ohio Gen. Code (Page, 1920), s. 8590 (full inheritance and transmission *ex parte materna*); Okla., Rev. Laws (1921), ss. 11303–4 (inherit from mother only; transmit on her side); R.I., Gen. Laws (1923), s. 5552 (inherit and transmit on mother's side as if lawfully begotten); S.C., Civ. Code (1922), s. 5334 (mutual inheritance between mother and illegitimate children); S. Dak., Rev. Code (1919), ss. 703–4 (inherit from mother, but do not represent her; transmit *ex parte materna*); Tenn., Ann. Code (Shannon, 1917), ss. 4166–7, 9 (inherit and transmit *ex parte materna* as if legitimate); Tex., Ann. Civ. Stat. (Vernon, 1914), Art. 2473 (inherit and transmit on mother's side as if legitimate); Utah Comp. Laws (1917), ss. 6413–4 (inherit and transmit on mother's side as if legitimate); Vt., Gen. Laws (1917), s. 3418 (inherit from and transmit to mother); Va., Code Ann. (1919), s. 5268 (inherit and transmit on mother's side as if lawfully begotten); Wash., Comp. Stat. (Remington, 1922), s. 5268 (inherit from mother only; transmit on mother's side).

[1] What constitutes effective acknowledgment varies in different jurisdictions. Generally speaking, it means a statement by the father that the child is his. The statutes cited (see *infra*, foot-note, p. 38), prescribe the necessary formalities for such acknowledgment.

[2] *E.g.* Cal., Civ. Code (1923), s. 1388; Colo., Comp. Laws (1921), s. 5158; Idaho Comp. Stat. (1919), s. 7794; Ind., Ann. Stat. (1914), s. 3000; Mich., Comp. Laws (1915), s. 11798; Minn., Gen. Stat. (1913), s. 7240; Porto Rico Rev. Stat. Codes (Comp. 1911), s. 4001; S. Dak., Rev. Code (1919), s. 703.

may inherit from him is that there should be no doubt as to the paternity of the person inheriting. But where paternity is established by judicial proceedings, the fact is *res judicata*, and, for legal purposes, a certainty. No valuable purpose is served by making the child's right depend on the whim of the father. Hence in Arizona,[1] Iowa,[2] Oregon,[3] and in Norway,[4] the right to inherit is not determined by acknowledgment or legitimation, but by judicial finding of paternity. The Uniform Act might well have incorporated provisions similar to these, which represent the most progressive attitude on the subject, especially in view of the fact that uniformity of laws among our States, on questions of inheritance and distribution, is urgently needed.

A sweeping provision like that of the Arizona statute,[5] making all children legitimate, would also have made clear the position of the child born out of wedlock in the case of workmen's compensation proceedings,[6] and of wrongful death actions. It is to be hoped that a uniform Act, treating the civil aspects of illegitimacy, will soon be forthcoming.

[1] *Supra*, foot-note, p. 38.

[2] Iowa Comp. Code (1919), s. 7916.

[3] Ore., Laws (Olson, 1920), s. 2563.

[4] Lov am forandringer i lov om arv av 31 Juli 1854 med tillaegslov av 27 Juni 1892 (law amending the inheritance law of July 31, 1854, and the supplementary law of June 27, 1892). (1915), s. 5, par. 2, and s. 6. Translated, see Magnusson, *supra*, foot-note, p. 34.

[5] *Supra*, foot-note, p. 38.

[6] A recent case held that an illegitimate child might recover under the Workmen's Compensation Act. *Portin* v. *Portin* (Tenn. 1924), 261, S.W. 362; see (1924), 24 Columbia Law Rev. 808.

THE CONSTITUTION OF IRAQ.

[*Contributed by* NIGEL G. DAVIDSON, ESQ.]

THE Iraq State and its Constitution were foreshadowed in the proclamation made by Sir Stanley Maude on the occupation of Bagdad in 1917. This has always been interpreted by the Arabs as the promise of an independent constitutional government with British support. The next step in its evolution should have been the formal and judicial detachment of Iraq from Turkey; but, owing to the non-ratification of the Treaty of Sèvres, this was not finally accomplished until the entry into force of the Treaty of Lausanne in the summer of 1924. In the meantime, however, Article 22 of the Covenant of the League of Nations had defined the status of territories detached from the Turkish Empire, now known as the "A" Mandates. The principle is stated as follows:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development when their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory, until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.
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> The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

The project for the Constitution of Iraq was originally drafted at a time when it was contemplated that Iraq would remain for an indefinite period subject to the Mandate accepted by Great Britain from the Supreme Council of the Allied Powers. In 1921 a draft Mandate was approved by the Supreme Council for submission to the Council of the League, but was never confirmed by the latter; and, pending confirmation, Great Britain was invited by the League

to carry on the administration on the lines laid down in the draft Mandate. The first article of this draft (which thus differs essentially from the Mandate agreed upon at the same time for Palestine) provides as follows :

> The Mandatory will frame within the shortest possible time, not exceeding three years from the date of the coming into force of this Mandate, an Organic Law for Mesopotamia, which shall be submitted to the Council of the League of Nations for approval, and shall, as soon as possible, be published by it. This Organic Law shall be framed in consultation with the native authorities, and shall take account of the rights, interests and wishes of all the populations inhabiting the mandated territory. It shall contain provisions designed to facilitate the progressive development of Mesopotamia as an independent State. . . .

It will be seen, therefore, that the problem of providing a suitable constitution for the new State was complicated by international considerations arising out of the mandatory system, by the Mandatory's responsibilities to her allies and to the League, and by the intense nationalism of the Iraqis themselves, which, fostered by British promises and by the success of the Arab movement, would brook no such limitation of independence as the Mandate implied.

Such was the position at the beginning of 1922 when the first draft of the Constitution was prepared. Following the election of the Amir Faisal as King the form of government adopted was that of a constitutional monarchy. But the agitation in Iraq against the Mandate, and in the British Press and Parliament in favour of reducing British responsibilities and expenditure, led to a profound modification of the scheme. This was no less than the substitution for the Mandate of a Treaty between Great Britain and Iraq by which the former promised assistance and support, and the latter undertook such obligations, in particular the acceptance of advice from the British High Commissioner, as would enable Great Britain to fulfil her responsibilities to other Powers and to the League. The Treaty lapses at the end of four years, or on the admission of the Iraq State to the League of Nations before the expiration of that period ; but in either event provision is made for a new voluntary agreement between the two States. Agreements regulating financial and military relations, the jurisdiction over foreigners and the employment of British officials are annexed to the Treaty and are of equal validity.

It is unnecessary here to go into the details of these arrangements ;

but it is obvious that such far-reaching obligations must affect both the form of the Constitution and its practical working. It is sufficient to say that Article III of the Treaty makes provision for the Organic Law in terms consistent with those of the draft Mandate already cited. It runs as follows:

> His Majesty the King of Iraq agrees to frame an Organic Law for presentation to the Constituent Assembly of Iraq, and to give effect to the said law; which shall contain nothing contrary to the provisions of the present Treaty, and shall take account of the rights, wishes and interests of all the populations inhabiting Iraq. This Organic Law shall ensure to all complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals. It shall provide that no discrimination of any kind shall be made between the inhabitants of Iraq on the ground of race, religion or language, and shall secure that the right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Government of Iraq may impose, shall not be denied or impaired. It shall prescribe the constitutional procedure, whether legislative or executive, by which decisions will be taken on all matters of importance, including those involving questions of fiscal, financial and military policy.

A Constitutional Assembly, elected on a register of universal male suffrage with special representation for Christian and Jewish minorities, and for unsettled tribesmen, sat in Bagdad from March to July of 1924. The ratification of the Treaty and Subsidiary Agreements was approved, and the Law of the Constitution, after having been referred to a Committee and discussed clause by clause, was passed by an unanimous vote. In September 1924 Great Britain laid before the Council of the League the Treaty and Agreements, and undertook to fulfil by their means the obligations which she had shouldered by the acceptance of the Mandate. The Council of the League resolved to approve the proposals, and to accept Great Britain's undertaking in place of the Mandate.

It is necessary to bear in mind the foregoing considerations if a just appreciation of the Iraq Constitution is to be arrived at. Some of its provisions which might appear open to criticism can only be understood by a reference to the limitations imposed by these international proceedings. In particular, machinery had to be provided in the Constitution for securing the execution of those Treaty obligations on which the recognition and, indeed, the very existence of the new State depended. Again, it must always be

remembered that the Law was not imposed by a dominating Power or a ruling party. By the terms of the Treaty it had to be passed, clause by clause, by the members of a Constituent Assembly, the large majority of whom were as devoid of any legal or political experience as they were elated by the Arabs' or the Kurds' self-confidence in their own superiority. It is, therefore, a matter of surprise, not that a few extravagant, illogical or xenophobe provisions may have found their way into the text, but that a handful of experienced lawyers, politicians and men of affairs should have succeeded in piloting the draft Constitution through the Assembly without fundamental alteration, and the resulting chaos. Lastly, if criticism is to be directed, as well it may, to the actual wording of the text, it is essential to note that the original is in the Arabic tongue, and that in the translation the niceties of exact phraseology, which that language does not possess, have had in some cases to be sacrificed in order to reproduce the sense of the original.

The political leaders in Iraq have all gained their experience under the pre-war Turkish Constitution, and several of them served as deputies in the Turkish Parliament. It is natural, therefore, that the Turkish Constitution has been taken as the most important, though not the only, precedent. In some matters the Mother of Parliaments has been laid under contribution, while several clauses, which were added or amended in the later stages of the draft, will be recognized as derived from the Egyptian Constitution which was promulgated when that of Iraq was still on the stocks.

"The Organic Law of Iraq" is divided into an Introduction and ten Parts.

Introduction.—Article 1 gives the short title as above. Article 2, which follows closely the first section of the Egyptian Constitution, lays down the customary general principles that Iraq is a sovereign State with an hereditary monarchy and representative government. Articles 3 and 4 prescribe the Capital and the Flag. The latter was one of the harmless though unnecessary additions made by the Constituent Assembly.

Part I. Rights of the People.—Iraq nationality is to be determined by special law (Art. 5). This law, which is about to be promulgated, is based on the relevant provisions of the Treaty of Lausanne, prescribing the nationality of inhabitants of the territories detached from Turkey.

Equality before the law of all Iraqis is declared by Article 6. The succeeding Articles (7–18) are similar to those in the Egyptian

Constitution, dealing with "the rights of man." Mr. Norman Bentwich has already summarized them in this *Journal*[1] as follows:

> The clauses defining "the rights of man" which are usual in foreign constitutions are reproduced in the regular form of a sweeping principle qualified by legal restriction. Thus, nobody may be arrested or put in prison, except in accordance with the prescriptions of the law. The domicile is inviolable, except that a search may be carried out in the cases prescribed by law. Correspondence is secret, except in cases prescribed by law. The Press is free within the limits traced by the law, and the preventive censorship is forbidden. The right of teaching is free, provided that the teaching is not contrary to public order. The right of association is granted, subject to the control of the law.

The general result is that, while personal freedom and the security of property are declared to be inviolable, the usual limitations of arrest, imprisonment, domiciliary search, conscription, control of the Press and of associations, expropriation of property, and taxation, are permitted, provided they are in accordance with law. Only torture, the exile of Iraqis, forced labour, the "general confiscation of immoveable property," expropriation without compensation, and fiscal or religious discrimination are absolutely prohibited. Slavery is not expressly prohibited in name, but the clauses safeguarding the personal freedom of all "dwellers" in Iraq, and prohibiting forced labour, should be sufficient to cover it.

It may be added that in the freedom of conscience clause (Art. 13) Islam is declared to be the state religion, and in Article 17 Arabic is made the official language, except as may be prescribed by special law.

Article 18 secures to Iraq exclusively all government appointments "except in exceptional circumstances, which shall be prescribed in a special law, and except in the case of foreigners, who may or shall be employed under Treaties or Agreements." This clause evoked acrimonious discussion in the Constituent Assembly, the exclusive right to patronage and to the emoluments of government employment being regarded by Oriental patriots as the supreme prize of natural independence. The exception at the end was grudgingly inserted, only because of the obligation contained in the agreement to employ a limited number of British officials, which is annexed to the Treaty.

Part II. The Crown.—"The sovereignty of the Iraq Kingdom belongs to the people, and it is a trust confided by the people to

[1] Third Series, vol. vi, pt. 1, p. 42.

King Faisal ibn Husain and his heirs after him" (Art. 19). This clause, which was passed after careful consideration by an undoubtedly representative Assembly, disposes of the suggestion, widely disseminated, that King Faisal's original election did not represent the real wishes of the people.

The following articles prescribe the succession in the direct line, the Royal Oath, machinery for a regency during the minority of the King, and the immunity of the King from "liability and responsibility."

Article 26 defines the powers of the Crown. The King is the head of the State; he sanctions and promulgates laws, supervises their execution, and makes by-laws within the limits prescribed by such laws; he concludes treaties, subject to ratification with the consent of Parliament; he appoints Ministers, Senators, and (on the recommendation of the responsible minister), diplomatic representatives, civil officials, judges and military officers; he is Commander-in-Chief of the Forces, can declare war with the consent of the Cabinet, and may proclaim martial law; the coinage shall bear his name, and he enjoys the prerogative of mercy.

But these very wide powers are very carefully limited by the following article, which provides that the King can only exercise these powers by Royal Iradah, which "shall issue on the recommendation of the responsible minister or ministers, and with the concurrence of the Prime Minister, both or all of whom shall sign the same." Both the power and the responsibility thus lie with the ministers.

It remains to consider perhaps the most important clause in this Part. Article 26 (*c*) gives to the King power, *when Parliament is not sitting*, to make, with the concurrence of the Cabinet, ordinances which shall have the force of law. This may be done when urgent measures are necessary for the maintenance of public order and security, for repelling a public danger, for expenditure not sanctioned by the budget or by special law, and for securing the fulfilment of treaty obligations. All such measures, *with the important exception of the last mentioned*, must be submitted to Parliament at the beginning of its session, and, if not accepted, the ordinance becomes invalid from the date of a government notification to that effect. The result is that, given the King's power to prorogue and dissolve Parliament, the King and his Ministers could, in the teeth of an unmanageable Chamber, provide for necessary supplies or decree the legislation necessary to implement treaty obligations.

It cannot be doubted that this is a wise provision, however deeply it may offend against the spirit of pure democracy. It was a matter of great satisfaction that the Constituent Assembly accepted it without demur. The first Parliaments of Iraq must at the best be untrained and inexperienced. It is vital that, in the last resort, the executive Government, with which alone the Allied Power can deal, should have authority to secure by legal means supplies for essential services and the fulfilment of those treaty obligations on which the very existence of the State depends. The fulfilment of those obligations could not be safeguarded by a mere right of veto in the King and his Ministers ; a part of the pact can only be implemented by substantive legislation. In this connexion it is of interest to note that a large body of the Turkish law brought into force since the establishment of the Turkish Constitution consists of " provisional laws " promulgated by Government, and never brought to Parliament for confirmation.

Part III. The Legislature.—" The legislative power is vested in Parliament with the King. Parliament consists of the Senate and the Chamber of Deputies, and shall, subject to the provisions of this Organic Law, have power to make, amend and repeal laws " (Art. 28). The anomalous wording of this article was adopted by the Constituent Assembly to emphasize the supremacy and independence of Parliament. A succeeding article prescribes the customary disqualifications for membership of either House. Members of the Senate must be at least forty, members of the Chamber thirty years of age. Members of the Royal Family are excluded.

" The Senate shall be composed of not more than twenty members appointed by the King from among those who, by their acts, have gained the confidence and trust of the people, and those who have an honourable past in the service of the Government and the country " (Art. 31). Their appointment is for eight years, but, following the Egyptian precedent, half the body is to be renewed every four years. Membership carries a salary and former senators are eligible for reappointment. The Senate sits contemporaneously with the Chamber. The principle of appointment of senators by the King, which at one stage met with considerable opposition, should ensure their support of the King's Government, and thus strengthen the hands of the Executive in the event of difficulties with the Chamber.

The Chamber of Deputies is to be elected by secret ballot on

the basis of one deputy to every 20,000 male Iraqis. The manner of election is left to be prescribed by special law. (This law, which was also passed by the Constituent Assembly, adopts universal male suffrage and a system of primary and secondary elections.) The electoral law is to have regard to the proper representation of non-Moslem minorities. Apart from dissolution, the life of the elected Chamber is four annual sessions of four months each, which may be extended to six months. In the event of a dissolution the new Chamber shall meet in extraordinary session within four months. The Chamber decides all questions of the qualification, and due election of its members and elects its own President, two Vice-Presidents, and two Secretaries from among its members. Vacancies are filled by a new election. Members are paid, but if a member absents himself for more than a month without permission or reasonable excuse he is deemed to have resigned. *Subject to special provisions in respect of financial matters*, every member, if supported by ten of his colleagues, has the right to propose legislation. If the proposal is accepted it has to be submitted to the Cabinet for the preparation of a Bill. Private members will thus find themselves very much in the hands of the Government.

The members of both Houses are required to take an oath of allegiance to King and country, and neither House may proceed to business, unless more than half the members are present. Decisions shall be by a majority of votes, the President having only a casting vote; but a majority is not valid, unless half the members present record their votes. Ministers may be questioned. Bills are to be passed clause by clause, and then as a whole. All sittings of both Houses are public, unless secrecy is demanded under special powers. Nobody may speak except members, ministers, or, in their absence, senior officials deputed by them and persons officially summoned by the House. Each House makes its own Standing Orders. Members enjoy freedom of speech and a limited immunity from arrest during the session. A Minister has the right to speak in either House, and precedence over all other speakers; but he cannot vote unless he is a member.

Bills cannot become law until they have been accepted by both Houses and approved by the King. If the King does not approve a Bill presented by the Government he must return it, with a statement of the reasons, within three months. In this event the law is silent as to the next step. Article 63 provides for a disagreement between the two Houses:

If one of the Assemblies shall twice refuse a bill and the other Assembly shall insist on its acceptance, a joint Assembly shall be convened, composed of the members of the Senate and of the Chamber of Deputies. The Assembly so formed shall sit under the Presidency of the President of the Senate to decide the disputed provisions of the Bill only. If the Bill, with or without amendments, is affirmed by a two-thirds majority of the joint Assembly, it shall be taken to have been duly accepted by both Assemblies. It shall not become law until it has been approved by the King. If not so accepted it shall not be again introduced into either Assembly during the same session.

Part IV. The Ministry (the word Cabinet is used as a synonymous term).—The number of Ministers shall be not less than six nor more than nine. A Minister cannot hold office for more than six months, unless he becomes a member of one House or the other. He may not buy or lease state property. The Prime Minister presides and communicates the decisions of the Cabinet to the King. Ministers are responsible to the Chamber of Deputies. The Chamber may pass a vote of no confidence in the Ministry as a whole or in a single Minister, and such a vote involves the resignation of the Ministry or the Minister, as the case may be. That a vote of no confidence in a Minister does not involve the resignation of the whole Cabinet shows that the principle of Cabinet solidarity is imperfectly understood. This is not to be wondered at, as hitherto in Iraq the Council of Ministers has been also the legislative authority, and has, therefore, been chosen as far as possible to represent various and often divergent interests. In such a case Cabinet solidarity was impossible.

Part V. The Judicature.—In Moslem countries the administration of justice is complicated by the existence, side by side, of two sets of Courts—Civil Courts which administer a modern system of law, framed in the Ottoman Empire and Egypt on a French model, and the " Shara' " Courts which administer the religious law of the Koran. The latter have jurisdiction over Moslems in all matters of personal status, marriage, inheritance, guardianship and religious trusts (*Waqf*, pl. *Auqaf*). The Prophet's law may have been highly suitable for a pastoral people of the seventh century, and even for the nomad and agricultural Arabs of to-day, but the march of civilization has left it too far behind. It is responsible for the deplorable status of women, the law of inheritance which, by forbidding testamentary disposition, necessitates the division and subdivision of every estate into infinitesimal shares, and the unconscionable claims of the Auqaf, which demand the right to

have every matter affecting them brought before a Court, naturally blind to any other interest. This system is not only the gravest bar to progress in Moslem lands, but a very serious thorn in the flesh of Government. Unfortunately the law is sacred, and it was therefore inevitable that the system should find a place in the Constitution. Accordingly, after a declaration that both Civil and Shara' Judges are irremoveable, except in accordance with a special law, the Courts are divided into three classes: Civil, Religious and Special. All Courts are to be free from interference, and all trials public, except where, for special reasons to be prescribed by law, Courts may sit *in camera*.

Apart from the matters assigned by law to the jurisdiction of the Religious or Special Courts "the Civil Courts shall have jurisdiction over all persons in Iraq, in all matters, civil and criminal, including claims by and against the Iraq Government." At first sight this might appear to conflict with the "Judicial Agreement" annexed to the Treaty, which secures to foreigners, in place of their extra-territorial privileges under the Capitulations, the right to have their cases, civil and criminal, tried by a British judge or by a Court containing a proportion of British judges. In fact, however, no such conflict arises. The British judges are themselves judges of the Iraq Courts, and have exactly the same powers and jurisdiction as their Iraqi colleagues. Foreigners' cases will, therefore, continue to be tried before the ordinary civil courts, in accordance with the Law of the Constitution, but in dealing with a foreigner's case the Court will be formed so as to include the requisite proportion of British judges of the Iraq Bench.

Enough has been said above in regard to the matters reserved for the jurisdiction of the Moslem Religious Courts. It may be noted, in passing, that provision is made for appointing Qadhis of the Shiah sect in districts where that sect form the majority of the population. In spite of the fact that the majority of the Iraqi Moslems are Shiahs, the Turks never appointed any but Sunni Qadhis, and consequently this new and equitable provision, introduced it is true by the British Administration, shows a creditable spirit of tolerance in the political classes, who are mostly Sunni. A like spirit is shown in the recognition of the "Spiritual Councils" of the Christian and Jewish communities as Religious Courts having similar jurisdiction to that of the Moslem Courts.

Of the Special Courts comprising the third division of the Judicature, only the powers and composition of the "High Court" are prescribed by the Organic Law. This rather cumbrous body,

which includes a number of senior judges and senators, or high administrative officials, as the case may be, is formed after the Turkish model, and deals with the trial of ministers, members of Parliament and judges, and decides questions regarding the interpretation and the constitutional validity of laws. As regards other special Courts, they may be established by law and may provide for courts martial, land courts, civil disputes between Government and its employees, and the settlement of tribal disputes of a civil or criminal nature in accordance with tribal custom. Great importance is attached to the latter by the tribal leaders, who form a very powerful section of the community.

Part VI. Financial.—Excepting those already in force, taxes may only be imposed by law passed by Parliament and approved by the King; and they shall be collected from all the classes and communities to which they apply without exception. There shall be no exemption except by law. Similarly, the authority of a law is required for the disposition of any state property, for the granting of monopolies and concessions, for the farming out of taxes, for the contracting of loans or for any agreement to pay money out of public funds not specified in the budget. No part of the "Fund in the Public Treasury" may be appropriated for expenditure, except by law, and in manner provided by law. The annual appropriations are to be made in the Budget Law, which shall include estimates of revenue and expenditure for the year, and shall be passed in the session preceding the financial year to which it relates. The Budget and all Appropriation Laws and Bills dealing with government loans "shall be introduced by the Minister of Finance into the Chamber of Deputies first."

Reference is again made in this Part to the King's power to authorize necessary financial measures by ordinance, when Parliament is not sitting. A very important provision is that no Bill, vote or resolution involving a charge upon public funds, for any purpose whatever may be proposed in either Assembly, except by a Minister; nor, without the previous consent of the King, may the Lower House "pass any resolution or propose any amendment to a law under discussion if such resolution or amendment proposes the reduction or cancellation of any expenditure arising out of treaties." The object is, of course, to safeguard the obligations undertaken by Iraq in the Financial Agreement annexed to the Treaty.

Part VII. Administration of the Provinces.—This part does little more than provide that the administrative system and the

duties and grades of officials shall be prescribed by law. It also prescribes the establishment by special law of Municipal Councils in towns and Administrative Councils in districts. The Turkish system is no doubt contemplated. Each "community" also has the right to form a "Communal Council" to manage religious trusts, charitable bequests, and the care and supervision of orphans.

Part VIII. Validation of Laws and Judgments.—This Part provides for the continuance in force of the whole existing body of law, until repealed or amended by the new Legislature or declared to be null and void by the "High Court." This body of law includes all Turkish law in force up to the entry of Turkey into the War, subsequent Turkish laws which have been in force in Iraq, and all the unrepealed proclamations, rules and laws of the successive military and civil administrations set up since the British Occupation. With this act of validation is combined an indemnity against all claims in respect of all acts done in good faith under the authority of those administrations, good faith being presumed unless proof to the contrary is established. There is a similar validation of all judgments and sentences.

Part IX. Change of the Organic Law.—If authorized by a two-thirds majority in both Houses, Parliament may within one year alter the details of its provisions for the purpose of carrying into effect the intention of the law.

Otherwise there can be no amendment for the first five years (which exceeds the duration of the Anglo-Iraq Treaty), and after that period an amendment can only become valid after it has been passed by a two-thirds majority of both Houses of one Parliament, and then by a two-thirds majority in both Houses of a second Parliament after the election of a new Chamber of Deputies. The wording of the Article implies that the King's approval is formal, and cannot be withheld.

Part X. General Provisions.—The King's power to proclaim martial law with the concurrence of his Cabinet is further defined. "The method of administration" of districts proclaimed to be under martial law is to be proclaimed by Royal Iradah. The King will thus be able to fulfil his obligations under a clause of the Military Agreement to entrust, in certain cases, the administration of such districts to the Air Officer Commanding the British Forces in Iraq.

The Organic Law enters into force from the date of the King's assent. At the time of writing, for reasons of convenience in the administration, the Royal Assent has not been formally notified.

THE NATIONALITY OF MARRIED WOMEN.

[*Contributed by* LUCIUS F. CRANE, ESQ., O.B.E. (LL.B. *Cantab*) *Solicitor; Member of the New York Bar.*]

THE importance of the legislation passed by the United States Congress in 1922, and known popularly as the Cable Act, can hardly be exaggerated in its application to the national status of married women and widows.

In order to appreciate the position, it is desirable to make a brief survey of the previous law in the United States; to examine, equally briefly, some features of existing legislation in the principal European countries, and to recall recent important legislation in England.

To analyse accurately the position of married women under American law, it is necessary to consider the status, first, of alien women marrying American citizens and, secondly, of American women who marry aliens, first premising that the question of nationality proper is exclusively reserved to the Federal Congress. This is, perhaps, merely to state the obvious, but is worthy of remark in view of the common reference in America, not only colloquial, but statutory, to "citizenship" of the various States, in the sense of residence.

It was not until 1855 that Congress definitely conferred on alien women, married to Americans, the privilege of acquiring American citizenship. Prior to that date, marriage had no effect upon the citizenship of a woman: an alien marrying an American citizen remained an alien. By s. 1994 of the Revised Statutes of the United States, passed in that year, "Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized,[1] shall be deemed a citizen." Even under this Act, however, nice questions occasionally arose as to the situation of such alien women, who continued to reside in their country of origin after the death of their husbands.[2]

[1] *I.e.* any free white woman or woman of African nativity or descent.

[2] See, for example, the case of Mrs. Marced de la Rodia, a native of Santo Domingo, in whose favour Mr. Ewarts, then Secretary of State, declined to interfere in 1879 (128 M.S. Dom. Let. 545).

With these occasional qualifications of the general rule, however, the national status of alien women who married American citizens was perfectly clear from 1855, until the Cable Act came into force in 1922. In the meantime, the Act of March 2, 1907 (34 Stat. 1229) enacted important legislation in regard to the situation of alien women, who married American citizens, after the termination of the marital relation. By that act—

> Any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation, if she continues to reside in the United States, unless she makes formal renunciation thereof before a Court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States Consul within one year after the termination of such marital relation.

In 1922, however, a most important change in the law occurred. By the Cable Act [1] it was provided that—

> Any woman who marries a citizen of the United States *after the passage of this Act*, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:
>
> (*a*) No declaration of intention shall be required;
>
> (*b*) In lieu of the five year period of residence within the United States and the one year period of residence within the State or Territory where the naturalization Court is held, she shall have resided continuously in the United States, Hawaii, Alaska or Porto Rico for at least one year immediately preceding the filing of the petition.

Since the Cable Act, therefore, an alien woman does not acquire American citizenship by reason of her marriage to an American citizen, except by virtue of her own naturalization, after a quite brief period of residence.

The important result is, of course, diversity of citizenship in the family, and, as will be seen later, "statelessness" in many instances in the case of the wife.

Such is the position of alien women married to American citizens. It remains, in examining the American law on the subject, to consider the situation of American women married to aliens.

[1] September 22, 1922 (42 U.S. Stat. at Large, 1021).

The Act of 1855 did not affect them and indeed, until the Act of 1907, their situation was not consistently interpreted by the Department of State and the Courts. In the main the common law rule, under which a woman retains her nationality in spite of her marriage to an alien, seems to have been more frequently invoked, subject to a tendency in some cases to regard the wife as acquiring the nationality of her husband during coverture, but resuming her own nationality after his death, if she returned to the United States to reside, but not otherwise.[1] Her position, both as wife and widow, was, however, very definitely defined by the Act of 1907, which provided that—

> Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

So long, then, as the Act of 1907 remained in force, English and American legislation was reciprocally convenient, and joined in conferring on the wife the nationality of her husband.

In recent years, however, the Women's Suffrage Movement has exerted an important influence on American legislation in this, as in many other respects—an influence which has received the hearty support of societies formed in England and on the Continent to advocate that the privilege of retaining their own nationality be accorded to women despite their marriage to aliens.[2]

The result of this influence in America was the Cable Act, which provides that—

> A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a Court having jurisdiction over naturalization of aliens: Provided, that any woman citizen who marries an alien ineligible to citizenship[3] shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of

[1] Van Dyne, Citizenship of the United States, s. 55 (1905); Moore, *Int. Law Digest*, vol. iii, pp. 448 *et seq.*

[2] See, for example, resolution of International Women's Suffrage Alliance at Rome, June 1923.

[3] Not a white person or person of African descent or nativity.

the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of s. 2 of the Act entitled, " An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907.

As to the resumption of American citizenship by women married before the Act it is provided as follows :

A woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by s. 2 of this Act: Provided, that no certificate of arrival shall be required to be filed with her petition if, during the continuance of the marital status, she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act.

No woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Accordingly, an American woman who has married an Englishman since September 22, 1922, is an American in America and an Englishwoman in England.

Before leaving the subject of American legislation, reference may conveniently be made to the question of " expatriation " which is dealt with in the Act of 1907. Put briefly, the object is to raise a presumption of expatriation in the case of naturalized Americans who reside more than two years in the country of their origin or more than five years in any other country outside the United States. Expatriation does not, however, entail loss of citizenship but merely loss of diplomatic privileges.

The law affecting the citizenship of married women in the principal countries of the world has recently been collated in a Memorandum of the Foreign Office printed as Appendix A to the Report of the Select Committee on the Nationality of Married Women, 1923. Excluding the South American Republics, whose laws on the subject are admittedly confused and difficult of analysis, it may be said that the great majority of foreign countries adhere to the principle that the wife takes the nationality of her husband. Under French law, however, a Frenchwoman only takes the nationality of her husband if, by the law of the foreign state in question, she acquires nationality of that State by virtue of

her marriage. A similar rule prevails in Italy, Portugal, India and Sweden. In Belgium, by a law of 1922, a Belgian woman who marries a foreigner of determined nationality (*i.e.* not a stateless person) loses her Belgian nationality if her husband's nationality is acquired by her according to the law of his country, but she may retain her Belgian nationality if she is of Belgian origin, by making a declaration within six months of her marriage, and a Belgian woman who marries a foreigner of no fixed nationality remains Belgian.

In England, at common law, marriage was ineffective to disturb the national status until 1844. The Naturalization Act of that year,[1] however, provided that "any woman married or who shall be married to a natural born British subject or person naturalized shall be deemed and taken to be herself naturalized and have all the rights and privileges of a natural born subject." But the status of Englishwomen who married aliens was not altered until the Naturalization Act of 1870,[2] which provided that a "married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject."

So the law remained until the passage of the British Nationality and Status of Aliens Acts of 1914, 1918 and 1922, the first of which repealed the Act of 1870. Ss. 10 and 11 of the Consolidated Acts read as follows:

(10) The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that, where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject, and provided that where an alien is a subject of a State at war with His Majesty it shall be lawful for his wife, if she was at birth a British subject, to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalization.

(11) A woman who, having been a British subject, has, by or in consequence of her marriage, become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has, by or in consequence of her marriage, become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject.

[1] 7 & 8 Vict., c. 66, s. 16.
[2] 33 Vict., c. 15, s. 10 (1).

Brief reference has already been made to the hardship suffered by an Englishwoman who marries an American. Intermediate the time of her marriage and her naturalization in America, she is stateless. Even if she desires to proceed to America to be naturalized, she cannot get a passport, either English or American, and if she cannot get a passport, she cannot proceed to America, even assuming that she could do so as an alien under the existing American Immigration Quota legislation. The moral is, of course, that Englishwomen should not marry Americans except in America. They can then proceed to America before marriage when the Quota permits, under a British passport.

The case of the American woman who marries an Englishman, on the other hand, presents none but a sentimental difficulty. If she lives in England for more than two years during the continuance of the marital status, she will be subject to the presumption of expatriation under the Act of 1922 and will lose her right, as an American citizen, to diplomatic privileges. On the other hand, she will be an Englishwoman in England and will be entitled to British diplomatic privileges. Her case presents no practical difficulties.

The statelessness of British women who marry Americans, and perhaps, in view of the tendency towards similar legislation in other countries, of British women who may in the future marry other aliens, presents, however, a serious and practical difficulty. Nor is it merely a question of statelessness. It is a question also of lack of unity in the family, against which the argument that marriage frequently involves other causes of disunion such as religion, incompatibility of taste and temperament, or political thought, is hardly convincing. The existence of admitted evils is not a ground for imposing an additional evil.

As practical arguments against a loss of nationality on marriage, the attention of the Select Committee on the Nationality of Married Women was drawn to a number of disabilities which Englishwomen who marry aliens, and thus lose their nationality, suffer, such as loss of the right to old age pensions, the franchise, etc.

Some of these disabilities may be important in a limited number of individual cases. It is difficult, however, to regard them as practical arguments when opposed to the disadvantage of an additional factor of disunity in the family. The more important question to consider is, whether legislation could not be framed which would deal with the admitted hardships entailed by conflicting

laws. There are only two alternatives: either to remain steadfast in the hope that America will once more revert to the law of 1907, or to alter the English legislation to overcome the chief points of hardship. That America will revert to the 1907 conditions is unlikely.

It is suggested, therefore, that a combination of the qualified rule in France, with an inexpensive and prompt method of resuming British nationality at the termination of the marital relationship, would secure a result which would meet the practical difficulties and the wishes of the vast majority of British wives of alien husbands. The principal heads of such legislation, then, would be:

(1) A provision that a British woman marrying an alien should take his nationality only if the laws of his country conferred his nationality on her.

(2) The privilege of resumption of British nationality by registration at a British Consulate abroad, or at the Home Office at home, or at a stated office in the Colonies or Dominions, on the termination of the marital status by divorce, or death.

There is no apparent reason why the resumption of nationality should be conditioned on a period of residence, as in the case of an alien. That period of residence, prior to naturalization, is presumably based on the necessity of assurance that the alien is sufficiently identified with the country, and acquainted with its institutions, to merit citizenship. In the case of a natural born Englishwoman, such a period of probationary residence would be an unnecessary hardship.

For the rest, it is difficult to regard loss of franchise, of the opportunity for admission to the civil service, and the like, as serious hardships in the circumstances. It must not be forgotten that, in the vast majority of cases, every step in life is fraught with the necessity of a decision between relative advantages and disadvantages. If marriage to an alien is worth while at all it is worth some sacrifices, and the average woman, or the average man if the case were his, can hardly be imagined as weighing the relative advantages between the formation of what she or he regards, at the outset at any rate, as a lifelong family tie, against the sacrifice of a possible right to an old age pension.

The day may come when society will regard the wife as entitled to at least an equal, and perhaps even a superior, right to determine the nationality of the family. It is enough, however, to legislate

in these matters for the present, and to leave future generations to solve the problems of the family status of to-morrow. What is apparently desirable to-day was thought unnecessary in 1870. To-day's legislation may be out of date in 1970. For to-day it is sufficient to remember that, in the vast majority of families, the husband is the protector and the home-maker and carries the burden of the family responsibilities. That the vast majority of wives are more than content to so regard their husbands and to throw in their lot with them, whatever it be, irrespective of home or nationality, is undoubted. One cannot seriously contemplate the average young woman declining an otherwise pleasing proposal of marriage on the ground that she will change her citizenship thereby.

In fine, the practical hardships entailed by the present conflict of legislation are two in number, and two only. First, loss of diplomatic privileges, and secondly, lack of unity, in one regard, in the family. The suggested amendment to the English law would at least go some way towards mitigating these hardships. It would permit an English bride, married in England, to obtain a passport and, if she so desired, to take ultimately, by naturalization, the nationality of her American husband, and it would permit a widow, or the wife of an alien divorcee, to resume her British nationality with a minimum of expense and trouble.

THE PRIVY COUNCIL AND THE CANADIAN CONSTITUTION.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Recent Trend of Interpretation of the Constitution.—The development of industrial activity in the Dominion of Canada, which has completely transformed the conditions prevailing in 1867, has brought into existence fundamental problems of Dominion and Provincial powers, and has imposed upon the Judicial Committee the delicate duty of defining the relative authority of the Dominion and the Provinces. Industry is essentially a matter which accords ill with provincial boundaries, especially when these are in the main artificial in character, and it was inevitable that the Dominion Parliament should attempt to assume the right to regulate commercial and industrial matters as questions of general Canadian concern. Precisely the same phenomenon has been seen in the case of the Commonwealth of Australia, in which the history of the Commonwealth Parliament has been largely one of efforts to employ its powers to regulate the commercial and industrial conditions of Australia. It is significant that the Privy Council in the case of Canada, and the High Court in that of Australia, have found themselves unable to accept the efforts of the Legislatures as valid, with the result that matters in both Dominions are left in a difficult and confused situation.

The Problem in Canada.—*Prima facie*, indeed, the Canadian Parliament seems to have sufficient powers as regards trade and commerce. S. 91 of the British North America Act confers on the Dominion Parliament power "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing

terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and of these classes the second is "the regulation of trade and commerce," [1] and the twenty-seventh "the criminal law." The exclusive powers given to the Provinces do not mention trade and commerce, but they include under s. 92 (13), "property and civil rights in the Province," (8) "municipal institutions in the Province"; and (16) "generally all matters of a merely local or private nature in the Province." Taking these provisions together, and acting on the necessary assumption that the Imperial Parliament intended them to be interpreted as consistent, it is obvious that a general power to deal with trade and commerce might be claimed for the Dominion on one or more of three grounds. (1) It might be contended that the interpretation of the express power of the Dominion to deal with trade and commerce must be held to be unaffected by the exclusive right of the Provinces in respect to property and civil rights or local or private affairs; this view could be supported by the consideration that substantial powers under these heads would still remain to the Provinces on this interpretation, while to deny a general authority to the Dominion would render the express grant of minimal importance. (2) It might be contended that, as the Dominion alone had power to legislate for Canada as a whole, and the Provinces were definitely restricted to legislation for the Provinces, it remained open to the Dominion to pass legislation necessary for the Dominion as a whole, even if the subject-matter were such that, if enacted for a single Province alone, it might be deemed to run counter to the powers of the Provinces under s. 92. This claim might be supported on the ground that in many cases, even if the Provinces were all to pass identic legislation, they could not effect the results aimed at, since cases could easily be imagined in which even identic legislation would fail of effect through the limited territorial authority of each Legislature. (3) Modern industrial conditions present constant possibilities of serious breach of order, and on this score it might be claimed for the Dominion that, as having

[1] In Australia the power is restricted to "trade and commerce with other countries and among the States," as in the Constitution of the United States (Art. I, s. 8 (3)), so that *prima facie* a wider area of authority appears to be conferred in the case of Canada.

sole power to deal with criminal law, it could regulate all matters of trade and commerce, so far as it could bring them within the ambit of enactments intended to secure that Canada should not be menaced by industrial strife coupled with the illegalities which both Canadian and American experience has shown to be inseparable from it.

The Attitude of the Provinces.—For the Provinces, on the other hand, the claim was naturally put forward that they should continue, despite federation, to enjoy the right of regulating their trade and commerce in all matters not necessarily falling within the powers of the Dominion. The wide interpretation of trade and commerce, it was argued, was quite inconsistent with the fact that among the exclusive powers conferred expressly on the Dominion were many special powers (*e.g.* currency, banking, bills of exchange, legal tender, bankruptcy, patents, copyright, weights and measures) which would not have been conferred if trade and commerce were to be taken in a general sense. It was, therefore, only reasonable to seek a restricted meaning of the terms, and this could be done by making them refer to such matters as trade agreements with foreign countries or other parts of the Empire. Attempts by the Dominion to deal generally with trade conditions in the Provinces would at once hamper gravely the Provinces, and embarrass the Dominion which had insufficient experience to deal with these issues.

The Attitude of the Privy Council.—The controversy seemed for a time to be likely to be settled in favour of the Dominion by the decision in *Russell* v. *The Queen*.[1] The Committee there laid it down that the Dominion Parliament had the power to enact uniform legislation, the Canada Temperance Act, 1878, for prohibiting the liquor traffic throughout Canada except under restrictive limitations. The decision in that case seemed to give countenance to the view that, if Dominion laws were requisite for the peace, order and good government of Canada, they were valid, though they might incidentally affect private rights in the Provinces. It was suggested also that the enactment might be upheld under the "trade and commerce" power, and further that such an enactment imposing penalties for violation of its provisions must be regarded rather as an enactment of criminal law than as affecting property and civil rights. The position of the Dominion thus seemed to be definitely established, but its triumph was short-

[1] 7 App. Cas. 829.

lived. In *Hodge* v. *The Queen* [1] the Committee held that the Ontario Liquor Licence Act which gave powers of regulation to local authorities within the Province was *intra vires*, thus definitely disposing of the view that the Dominion power as to trade and commerce had the wide sense which *prima facie* it bore. Still more serious was the decision of the Committee [2] that the Dominion licensing statute (46 Vict. c. 30) known as the McCarthy Act, which sought to create a local licensing system for the liquor traffic throughout the Dominion was *ultra vires* the Dominion, though the Committee in giving this opinion refrained from setting forth their grounds, and did not in terms dissent from the reasoning in *Russell* v. *The Queen*.

The Insurance and Board of Commerce Cases.—The issue was still more definitely decided unfavourably to the Dominion in the discussion of the power of the Dominion to legislate regarding insurance. In *Attorney-General for the Dominion* v. *Attorney-General for Alberta* [3] it was definitely decided that the trade and commerce power did not extend to permit legislation establishing a licensing system for the regulation of a particular trade, that the general power to legislate for peace, order and good government did not cover such legislation, and that it in effect really dealt with civil rights in the Province, thus usurping a provincial sphere. It was indicated also that the mere provision of penalties for failure to observe the rules as to licensing could not be held to bring the legislation within the Dominion power of dealing with the criminal law, and, when the Dominion Parliament returned to the attack by enacting similar provisions as parts of the Criminal Code, this effort to outflank the decision was decisively negatived.[4] The Dominion effort to enforce control of food prices was equally decisively defeated,[5] on the score that the matter neither appertained to trade and commerce nor to criminal law, while, as the legislation was passed after the Armistice, it was impossible to justify it on the ground that there remains to the Dominion a residuary authority to legislate in crises for the common safety. The existence of this supreme, if limited, authority was also definitely recognized in *Fort Frances Pulp and Power Co.* v. *Manitoba Free*

[1] 9 App. Cas. 117.
[2] *Cf.* Keith, *Imperial Unity*, pp. 451 ff.
[3] [1916] 1 A.C. 588.
[4] *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328.
[5] *In the Board of Commerce Act*, 1919, [1922] 1 A.C. 191.

Press,[1] in which it was conceded that under war conditions the Dominion Parliament may make laws, even if they do infringe civil rights and affect property in the Provinces.

The Industrial Disputes Investigation Act.—In view of these decisions, it was obvious that opinion on the authority of the Dominion must be drastically revised, and it was quite inevitable that the validity of the Industrial Disputes Investigation Act, 1907, should be formally challenged. This Act, which has won well-deserved reputation as a means of aiding in the settlement of industrial strife, proceeded on the basis of empowering the Dominion Minister of Labour to appoint a Board of Conciliation and Investigation to examine industrial disputes on the application of either party to the dispute, the application to be supported by a sworn declaration that, failing adjustment, a lock-out or strike would probably occur. It was also provided by s. 56 of the Act that, when a dispute had been referred to a Board, it was unlawful for a lock-out or strike to be declared pending the reference, under the penalty of a fine. Under s. 57 thirty days' notice of any change in respect of wages or hours of employment was to be given on either side, and, if a dispute arose out of such a notice, no lock-out or strike could be declared pending reference to a Board, if this were applied for. The Board was given no power of final determination of disputes; it endeavoured to obtain agreement, and, if this were reached, the result was embodied in a recommendation, which could then be enforced as a rule of Court. If agreement were unattainable, the Board reported its proceedings to the Minister, adding a recommendation for settlement, which then was published by the Minister, in order to allow public opinion to operate on the matters at issue. The merits of the scheme are obvious, and Ontario in 1914 imitated it in its Trade Disputes Act, which, of course, applied to that Province only, but in this legislation the attempt to forbid a strike or a lock-out pending references was omitted.

The Case of the Toronto Electric Commissioners.—In 1923 a dispute arose between the Toronto Electric Commissioners, who are a Public Utility Commission within the meaning of chapter 204 of the Revised Statutes of Ontario, 1914, appointed to manage the municipal electric light, heat, and power works of the city of Toronto, and their employees. An application was made on behalf of the latter to the Dominion Minister of Labour for the appoint-

[1] [1923] A.C. 695.

ment of a Board of Conciliation, which was duly granted. The Commissioners, however, applied to the Supreme Court for an injunction forbidding any further proceedings by the Board on the score of the invalidity of the Dominion Act. It was, however, finally determined by the Appellate Division of the Court by a majority, that the Act was a valid exercise of the Dominion power. It held that the Act could be sustained (1) as directed to the regulation of trade and commerce throughout Canada ; (2) as protecting national peace, order and good government by confining within limits a dispute which might otherwise spread over all the provinces, and by informing the general public of its merits so as to bring public opinion to bear on it ; and (3) as an enactment of criminal law.

The Judgment of the Privy Council.—However natural the reluctance to reverse a judgment so obviously commended by reasons of public policy in view of the long and valuable service of the Act of 1907, it was inevitable that the Judicial Committee should find all three grounds inadequate in view of the earlier decisions of the Board.[1] The appeal to the trade and commerce power was clearly incompetent, for in the Insurance case it had definitely been laid down by the Board that *Russell* v. *The Queen* was not to be regarded as decided on that clause, and that it could not be supported on that ground. The argument from the criminal law was also disposed of in principle by the judgments in the Board of Commerce and Insurance cases, but efforts were made to distinguish these on various grounds. But the Committee held that the penalties of the Act must be regarded as merely ancillary, not as real enactments of criminal law, laying stress on the fact that no effort was made to declare strikes illegal in every case. It was also laid down that, even assuming that under the common law of Canada [2] strikes were illegal, so that legislation to prevent them might be held to be a part of criminal law, still this could not be said of lock-outs, and it was clearly impossible to separate the provisions of the Act and hold it valid as regards strikes, invalid as regards lock-outs. Finally the Committee definitely and narrowly restricted the residuary power of legislation of the Dominion to cases arising out of some extraordinary peril to the

[1] 41 *The Times, L.R.* 238, *sub nomine, The Toronto Electric Commissioners* v. *Snider and Others.*

[2] As based on the English criminal law of September 17, 1792, introduced into Upper Canada by 40 Geo. III, c. 1, and re-enacted as to Ontario by s. 10 of the Criminal Code of 1892.

national life of Canada as a whole, such as emergencies arising out of a war, where legislation is required of an order passing beyond the heads of exclusive provincial competency. The decision in *Russell* v. *The Queen* now must be held to rest on the —historically dubious—view that the danger of intemperance when the Canada Temperance Act was passed was so great as to constitute a menace to the national life so serious and pressing that the National Parliament was called upon to intervene to protect the nation from disaster. Applying this standard to the Act of 1907, it was inevitable that the Committee should hold that its enactment could not be supported on this ground.

The Present Situation. — We must now, therefore, definitely recognize that, save in war or in some national emergency, the powers of the Dominion Parliament are in effect only those given specifically by s. 91, while those of the Provinces are equally specifically given in s. 92, the Dominion having the power expressly given by s. 91 to invade the provincial sphere, but only in regard to the exercise of its specific powers. It appears, therefore, that there is a definite lacuna in the scheme in the absence of any such power in the Dominion as is expressly conferred on the Commonwealth, which has power [1] to legislate as to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The Ontario Trade Disputes Act, 1914, whose validity was confidently asserted by the Committee,[2] might have been invoked to deal with the dispute in question, but obviously, as matters stand, no effective machinery can be devised to control disputes which extend throughout the Dominion. Even if identic legislation could be passed in each Province, there would be no possibility of a determination by a single Board, and efforts to secure settlement by the action of distinct provincial Boards would merely cause chaos. Australian experience,[3] however, has proved the difficulties of the limited form of authority given to the Commonwealth, nor in all probability would much satisfaction have been felt in the Dominion even if the Committee had shown any inclination to concede legislative power in such cases to the Dominion. It may be regretted that the Committee has not found it possible to take a broader view of the trade and commerce power, and that *Russell* v. *The*

[1] Constitution, s. 51 (xxxv).
[2] Under s. 92 (13) and (8) of the British North America Act.
[3] *Cf.* Keith, *War Government of the British Dominions*, pp. 303 ff.

Queen should now have almost been explained away, but it is easy to see that a wider view of either the trade and commerce or the residuary power might have meant serious inroads on the sphere of the Provinces. Unfortunately, it is extremely difficult to restore to the Dominion the authority which it has so long deemed itself to have, and of which excellent use has been made. The Dominion constitution is so rigid that any new power could be acquired only with the concurrence of the Provinces, which show no willingness to surrender any of their authority. Yet it cannot be held satisfactory that the needs of a great community in the process of rapid industrial expansion should be fettered by the terms of a compact arrived at sixty years ago by sparsely settled provinces with infinitely less complex social conditions.

THE PROPOSAL FOR SCIENTIFIC COPYRIGHT, WITH THE LITERARY PARALLEL.

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FOR several years there has been a growing feeling among scientific men generally, throughout the world, that the law should recognize their original contributions to knowledge by securing to them some recompense out of the profits resulting from the industrial applications of their discoveries.

It is argued, and it would seem as if there could be little difference of opinion as to the abstract justice of the suggestion, that if A makes a discovery which B uses, and from which he makes a profit he would not otherwise have made, he ought, in all fairness, to share this profit with A, and, if he is unwilling, the law should compel him.

The fullest exposition of this proposal has been made by Senator Ruffini, in his report on Scientific Property to the Committee on Intellectual Co-operation of the League of Nations. As to the general equity of the plan, Senator Ruffini said:

> This first consideration, which arises out of temporary conditions, must be supplemented by another consideration, of a permanent character. I refer to the flagrant and intolerable injustice—quite apart from present conditions of difficulty—which characterizes the provisions of the laws regarding scientific work and inventions, in comparison with their provisions in regard to artistic and literary work or industrial inventions. It may be said that hitherto the law has only recognized the two extremes of intellectual work: the base and the summit. The inventor of a new kind of india-rubber heel, than which one can imagine nothing more earth-to-earthly, may acquire a fortune by patenting his invention. At the opposite extreme is the musical composer who could give to the world a Ninth Symphony—that is to say, the highest approach to the ideal made by the mind of man. For him, universal applause is not the only reward; the law regarding author's copyright enables him to secure the pecuniary profits which are his due. But to the man of science who observed a truth from which humanity will in the future draw immense and durable advantages, the law accords nothing. This omission will undoubtedly be a source of astonishment to future generations, just as we experience surprise at the defects in the legal systems of earlier times—defects which would be impossible at a later stage of civilization. A link is wanting in the chain of law which should secure due recognition to all the creations of the mind, from the most positive, the most concrete, the most practical to the most abstract, the most transcendental and the most ideal.

The report continues:

A scientist, then, ought to reap the fruits of his intellectual labour.

The question is, in which of two ways: whether by acquiring the right to apply and to "exploit" his discovery himself, or by obtaining a share of the profits which others might derive from his idea.

The second of these two alternatives is the more probable. In fact, a scientist is generally lacking in the qualities necessary to undertake the exploitation of his own discoveries, and the opportunity to do so only rarely presents itself. This is perhaps a dispensation of Providence. For many subsequent discoveries of scientific truths would be lost to humanity if these conditions were to change. But such noble disinterestedness must not be allowed to the disadvantage of the man of science. It is incumbent upon the law to protect him, almost in spite of himself, as has lately been done in the case of artists. Something like a *droit de suite* to the idea born in the brain of a scientist must be instituted for his benefit; M. Lucien Klotz was the first, it would seem, who made a proposal to this effect and who defended his proposal in several French papers. A scientist must be granted a sort of royalty (*redevance*) on the money value which his discovery is likely to acquire by means of its practical application and its industrial utilization, within a specified period of time.

The plan has been embodied in a Convention by which it is proposed (in Articles 1 and 2) to form a union for the protection of the rights of authors to their scientific discoveries or inventions, and providing that they shall enjoy the exclusive right of deriving profit therefrom. The purpose of the Convention, as stated in Article 3, is —

to protect discoveries; that is to say, expositions and demonstrations of the existence, previously unknown, of laws, principles, bodies, agents or properties of living beings or of matter, and inventions; that is to say, creations of the mind (consisting of methods, appliances, products, the composition of products previously unknown, and in general, all new applications of discoveries and inventions) the specifically scientific character of which deprives them of the protection granted to works of industry, art and literature.

The duration of the proposed protection is the lifetime of the author and fifty years after his death (Article 4).

Article 5 provides that the authors of the discoveries and inventions described in Articles 2 and 3 may not put obstacles in the way of the industrial or commercial exploitation of the new application of their discoveries and inventions, but they shall preserve authors' rights in respect of the economic advantages of such exploitation.

It is further provided that the author of a discovery or an invention shall be required to grant the requisite licence for ensuring the necessary supply for public use, the different manufacturers or exploiters being bound to reserve to him authors' rights in accordance with Article 5.

Under the title "General Objections," the report continues:

The chief objections which are at present opposed to the recognition of the scholar's rights over the creations of his mind are the same as those formerly raised against the claims of the artist and the inventor. If a comparative table were drawn up of the former and present objections, they would be found to coincide exactly. The comparison would convince us that these objections will be overcome to-day, just as they were in former times, by the exigencies of life and progress and through the instrumentality of legislation and education. Indeed, it may be considered that arguments on this point have been exhausted.

It may be interesting to recall certain incidents in the history of literary property which bear out Senator Ruffini's statement just quoted. But first, in order to get the proper perspective, it is necessary briefly to trace the development of the idea of property in published literary work.

One may search in vain through classical literature and Roman law to find anything in the nature of copyright, as we understand it. Stealing another man's ideas and passing them off as one's own was a literary crime of which Latin authors frequently and bitterly complained, but the manual labour involved in making manuscript copies pretty effectually prevented serious literary piracy. It was not until the invention of printing that the matter assumed practical proportions. Now multiplication became easy, because the power to make a large number of copies was in the hands of any possessor of one of the printed books plus access to a printing press. The political danger of an unrestrained press was at once apparent, and the earliest restrictions were in the direction of preventing the spread of sedition and heresy. The rights of an author were either forgotten or subordinated to what seemed, at the time, more important matters.

Upon the introduction of printing in England, it was at first assumed that all printing was a royal prerogative, and certain persons were licensed to exercise the art by grants which were in the form of letters patent and frequently permitted the grantee to print certain specific books.

In order better to control the right of printing, which it was seen might be a powerful factor in forming public opinion, the Company of Stationers was incorporated by Philip and Mary in 1556, although for a century or more earlier there had been a guild of text writers or stationers. On the theory that printing was a royal prerogative, the members of the Stationers Company were given the monopoly of the business of printing books.

There was much interesting discussion and not a little refinement indulged in for the ascription to the King of the royal prerogative in this respect. For example, it is ingeniously asserted that, since the King paid for translating the Bible, the translation belonged to him; he was the head of the Church, therefore he owned the Prayer Book; he paid the legislators, hence the right to publish the laws was his; almanacs were but a form of Church calendar, and belonged to the King as head

of the Church. Whatever may have been the reason for these prerogative copies, as they were called, whether money paid by the King for their production or for any other reason, the fact was that the King had absolute power to control not only the books in which the prerogative was asserted, but all books. The printers and booksellers, therefore, quite naturally acquiesced in the King's claim of property and sought licence to print not only the prerogative copies, but other books as well. These prerogative copies and royal licences are frequently adduced in the attempt to show that copyright existed in England from the date of the introduction of printing, but the fact probably is, that these grants were examples of the commercial monopolies common at the time, and did not recognize, even impliedly, any right in an author to his literary compositions.

The Company of Stationers maintained a register in which were entered the titles of the books which its members were privileged to print. A custom developed by which each refrained from printing the books which stood on the register in the name of another, and after the abolition of privileges, at the time of the Revolution, the custom was so well established that members respected each other's "copy," as it was called, more, perhaps, to prevent destructive competition than otherwise. But, whatever the reason, the fact is that members refrained from printing books of which another was the registered proprietor. In this way there grew up a trade recognition of what was called the right of copy or copyright, at first purely as a matter of custom, later embodied in the by-laws of the Stationers Company. This right, the booksellers asserted, was a common law right and was perpetual.

When the Court of Star Chamber assumed control of all printing, a decree was promulgated prohibiting the printing of any unlicensed book and requiring the licence to be entered in the Register Book of the Company of Stationers. The general purpose of this decree, and the Licensing Acts which followed it, was to control every sort of printing. They were aimed at what they call "disorderly printing," but many of them suggest the existence of a right of copy in books.[1]

Milton thundered against these decrees and orders in *Areopagitica*, excepting only the parts which implied a right of copy. Concerning one of these he said:

> For that part which preserves justly every man's Copy to himselfe, or provides for the poor, I touch not, only wish they be not made pretenses to abuse and persecute honest and painfull Men, who offend not in either of these particulars . . . and the just retaining of each man his severall copy, which God forbid should be gainsaid.

These orders and decrees in the main benefited the booksellers and were all in the direction of strengthening the commercial monopoly in

[1] See Arber's edition of Milton's *Areopagitica* (pp. 7–28) for text of the decree and Licensing Acts.

the art of printing, which the Stationers Company had so long enjoyed, but they are made the basis of the arguments which were afterwards so ardently advanced in support of the assertion that perpetual copyright in published works existed at common law, as a matter of historical fact. They probably, however, go no further than to furnish some support for the contention that the booksellers supposed themselves entitled to a perpetual right of copy, or at least asserted it, and that some of the decrees and licensing Acts inferentially assume that a right of some sort existed.

The Stationers Company's monopoly becoming less and less secure on account of the general tendency of the times to curtail monopolies of all descriptions and the difficulty of detecting and putting a stop to "disorderly printing," led the booksellers in 1703, 1706 and 1709 to petition Parliament for relief. In their petition they said:

> The liberty now set on foot of breaking through this ancient and reasonable usage is in no way to be effectually restrained, but by an Act of Parliament. For by common law a bookseller can recover no more costs than he can prove damage, but it is impossible for him to prove the tenth, nay, perhaps the hundredth part of the damage he suffers, because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he not be able to prove the sale of ten. Besides, the defendant is always a pauper, and so the plaintiff must lose his costs of suit. (No man of substance has been known to offend in this particular, nor will any ever appear in it.) Therefore, the only remedy by the common law is to confine a beggar to the rules of the King's Bench or the Fleet, and there he will continue the evil practice with impunity. We, therefore, pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders.

This petition resulted in the Act of April 10, 1710, known as the Statute of 8 Anne, c. 19. It is said to have been drafted, in part at least, by Addison and Dean Swift, and started a controversy which raged unabated for a century and a half.

This Act was entitled, "An Act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the terms therein mentioned." And, though the result certainly was never intended by those who advocated it, this statute was the thing which led to the destruction of whatever common law right there may have been. It included not only new but old books, and provided that:

> From the 10th of April, 1710, the author of any book already printed . . . shall have the sole right and liberty of printing such book for the term of twenty-one years to commence from the said 10th day of April and no longer, and that the author of any book not yet printed, and his assigns, shall have a similar right for fourteen years from first publication and no longer.

Naturally no case could arise under the Act until at least fourteen years had elapsed, or, in the case of an old book, twenty-one years, or until 1731. There were certain cases in Chancery, but it was not until 1760 that the question of perpetual copyright was presented in the Court of King's Bench, in *Tonson* v. *Collins*.[1] The subject-matter was Addison's *Spectator*, which was first published in 1711, and was clearly outside the terms of the statute. Copies were alleged to have been printed by defendant without plaintiff's licence. The jury brought in a special verdict. The Right Hon. Augustine Birrell, in his delightful copyright lectures, calls this a "cock and bull" verdict, and if a "cock and bull" verdict is one which bears unmistakable evidence of having been laboriously and carefully drafted by capable counsel for the sole purpose of preventing a Court from avoiding perplexing law points, this verdict certainly merits the description. Wedderburn and Blackstone appeared for the plaintiff. Thurlow and Yates, for the defendant, argued that the property of an author, "if any, is only in the incorporeal ideas and not in the profit to which another man applies them."

In spite of the comments of the judges made during the argument, from which it seemed as if the Court was for the plaintiff, the case was ordered to stand over and be reargued before all the twelve judges of the King's Bench. But, in the meantime, someone having intimated to the Court that the whole thing was collusive, that the defendant was nominal only, and that the entire expense of the proceeding was being borne by the plaintiff in order to get a precedent, the Court refused to proceed further.

The Scottish invasion of the English publishing trade soon furnished another defendant for a test case, and in this instance there was no suspicion of collusion. *Millar* v. *Taylor*[2] was an action brought in 1766 to recover for the unlicensed publication of Thomson's *Seasons* after the expiration of the statutory period. A jury brought in the same sort of "cock and bull" verdict, and this time a decision was reached. It was held by a majority of the judges, Lord Mansfield, Justices Aston and Willes (Justice Yates dissenting), that perpetual copyright after publication existed by the common law and was not taken away or limited by the statute of Anne.

Donaldson v. *Becket*[3] came before the House of Lords in 1774 upon an appeal from a decree of the Court of Chancery founded upon the judgment in *Millar* v. *Taylor*. The House summoned the judges to advise it. Sir John Dalrymple opened the case for the appellants. The reporter of the proceedings evidently did not approve of Sir John's argument, for, after attempting to follow it for a while, he concludes thus:

[1] 1 Wm. Blackstone, 300. 96 *English Reports*, Full Reprint, 169.
[2] 4 Burr, 2303. 98 *English Reports*, Full Reprint, 201.
[3] 4 Burr, 2408, 2 Bro. P.C., 129. 17 Cobbett, *Parliamentary History*, 954, 1003. 1 *English Reports*, Full Reprint, 837.

Sir John, having thus combated the statute of Queen Anne, made a variety of miscellaneous observations rather foreign to the point, but introduced seemingly to level a stroke of sarcastic humour. He said that he was informed the counsel on the opposite side intended to prove that a copyright had been acknowledged by the testimony of several divines; but, with deference to the Church, he did not believe what they signed to be the truth. He said that authors and booksellers seldom were men of family or fortune; it was therefore extremely difficult to find out their heirs ten years after their deaths. He said that twelve or thirteen booksellers were hovering, like eagles over a carcass, about the remains of poor Thomson; but he hoped their lordships would protect those remains from such hungry vultures.

Sir John then talked about ideas. If I copy a manuscript, says he, and publish it, I am liable to a civil action; if I steal a book, to a criminal one; the one is simply taking ideas, the other a chattel. But, argues he, what property can a man have in ideas? Whilst he keeps them to himself they are his own, when he publishes them they are his no longer. If I take water from the ocean it is mine, if I pour it back it is mine no longer. Besides, continues Sir John, there are various methods of conveying ideas; by looks, at which the ladies are most expert. Now, an ogle is a lady's own whilst in private, but if she ogles publicly they are everyone's property. By gesture, ideas are conveyed; Foote's or any other person's puppet-show continued his before public representation, but after that anyone might imitate it. Prints and engravings were, when once made public, the property of every imitator. Hence, in the case of one of Hogarth's prints, an Act passed vesting an exclusive right in his widow for a term of years. . . .

Such is the substance of most of Sir John Dalrymple's arguments. Sir John spoke for two hours and a half, and seemed to exhaust in this one speech all the knowledge, metaphysical, legal, chemical and political, he possessed. He passed the greatest encomiums on Lord Hardwicke, mentioned a doubt of his lordship's upon the subject of literary property, and said "that the doubts of one wise man contained more information than the dogmatic opinion of ten thousand weak blockheads."

Sir John computed the number of printers and booksellers in London to amount to thirty thousand, and dropped the following expression: "When the Lord Mayor was parading from the House after some popular act about discharging the printers, I was in the city, and, perceiving the mob not so numerous as might be expected, I inquired the reason, and was told that a printer had been hanged that day, and ten thousand of the brotherhood chose rather to attend that than the Lord Mayor's procession."

A series of questions, covering every possible aspect of the case, were put to and answered by the judges. The result was that it was held that, while there had been a perpetual common law copyright after publication, it was extinguished by the statute of Anne, and that thereafter all rights in published literary work would depend upon the statute. The law remained in this condition until *Jeffers* v. *Boosey*,[1] where it was held there never had been such a thing as a common law copyright after publication. It seems strange that the final settlement

[1] (1854) 4 H.L.C. 481. 10 *English Reports*, Full Reprint, 681.

of the matter did not come until so late, but, as Mr. Birrell, in his *Lectures on the Law of Copyright,* has said, this is probably due to the fact that after his first publication the British author usually disappeared, and if he reappeared it was in the pillory, and it may well be said that he was more exercised in getting out of the pillory than in protecting the work that got him there.

The general public attitude had long been unfavourable to the booksellers, who were regarded, whether justly or not, as a grasping lot. Indeed, Milton once described them as " old patentees and monopolizers." This feeling is clearly seen in Lord Camden's speech moving the judgment of the House, although he took occasion as well to give the authors a little advice. After discussing prerogative copies, the Star Chamber decrees and Licensing Acts, the custom and by-laws of the Stationers Company, he proceeded:

> In a few years afterwards the Revolution was established, then vanished prerogative, then all the by-laws of the Stationers Company were at an end; every restraint fell from off the press, and the whole common law of England walked at large. During the succeeding fourteen or sixteen years, no action was brought, no injunction obtained, although no illegal force prevented it: a strong proof that at that time there was no idea of a common law claim. So little did they then dream of establishing a perpetuity in their copies, that the holders of them, finding no prerogative security, no privilege, no Licensing Act, no Star Chamber decree to protect their claim, in the year 1708 came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security. They obtained the Act. And again and again sought for a further legislative security.
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> If there be anything in the world common to all mankind, science and learning are in their nature *publici juris,* and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize His noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and to improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits who share that ray of divinity which we call genius, are entrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner; to be enjoyed it must be communicated. *Scire tuum nihil est, nisi te scire hoc sciat alter.* Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain

that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it, and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are.

Lord Chancellor Apsley seconded Lord Camden's motion to reverse, and, after a series of speeches, including one by the Bishop of Carlisle, who used arguments similar to Lord Camden's,[1] it was ordered that the decree appealed from be reversed without costs.

Dr. Johnson expressed himself on the subject with his usual force. Boswell says:

He was loud and violent against Mr. Donaldson. "He is a fellow who takes advantage of the law to injure his brethren; for, notwithstanding that the statute secures only fourteen years of exclusive right, it has always been understood by the trade that he who buys the copyright of a book from the author, obtains the perpetual property; and upon that belief, numberless bargains are made to transfer that property after the expiration of the statutory term. Now, Donaldson, I say, takes advantage here, of people who have really an equitable title from usage; and if we consider how few of the books, of which they buy the property, succeed so well as to bring profit, we should be of opinion that the term of fourteen years is too short; it should be sixty years." Dempster: "Donaldson, sir, is anxious for the encouragement of literature. He reduces the price of books, so that poor students may buy them." Johnson (laughing): "Well, sir, allowing that to be his motive, he is no better than Robin Hood, who robbed the rich in order to give to the poor."[2]

The lot of a literary man of the period is thus picturesquely described by Macaulay, in his review of Croker's edition of Boswell's *Life*:

The prices paid by booksellers to authors were so low that a man of considerable talents and unremitting industry could do little more than provide for the day which was passing over him. The lean kine had eaten up the fat kine. The thin and withered ears had devoured the good ears. The season of rich harvest was over, and the period of famine had begun. All that is squalid and miserable might now be summed up in the word Poet. That word denoted a creature dressed like a scarecrow, familiar with comp-

[1] There is much that is interesting in these speeches which are to be found in 17 Cobbett's *Parliamentary History*, pp. 954, 1003 and following.

[2] Temple Ed., Boswell's *Johnson*, vol. ii, p. 120.

ters and spunging-houses, and perfectly qualified to decide on the comparative merits of the Common Side in the King's Bench prison and of Mount Scoundrel in the Fleet. Even the poorest pitied him; and they well might pity him. For, if their condition was equally abject, their aspirings were not equally high, nor their sense of insult equally acute. To lodge in a garret up four pairs of stairs, to dine in a cellar among footmen out of place, to translate ten hours a day for the wages of a ditcher, to be hunted by bailiffs from one haunt of beggary and pestilence to another, from Grub Street to St. George's Fields, and from St. George's Fields to the alleys behind St. Martin's Church, to sleep on a bulk in June and amidst the ashes of a glasshouse in December, to die in a hospital, and to be buried in a parish vault, was the fate of more than one writer, who, if he had lived thirty years earlier, would have been admitted to the sittings of the Kitcat or the Scriblerus Club, would have sat in Parliament, and would have been entrusted with embassies to the High Allies; who, if he had lived in our time, would have found encouragement scarce less munificent in Albemarle Street or in Paternoster Row.

As every climate has its peculiar diseases, so every walk of life has its peculiar temptations. The literary character, assuredly, has always had its share of faults, vanity, jealousy, morbid sensibility. To these faults were now superadded the faults which are commonly found in men whose livelihood is precarious, and whose principles are exposed to the trial of severe distress. All the vices of the gambler and of the beggar were blended with those of the author. The prizes in the wretched lottery of bookmaking were scarce less ruinous than the blanks. If good fortune came, it came in such a manner that it was almost certain to be abused. After months of starvation and despair, a full third night or a well-received dedication filled the pocket of the lean, ragged, unwashed poet with guineas. He hastened to enjoy those luxuries with the images of which his mind had been haunted while he was sleeping amidst the cinders and eating potatoes at the Irish ordinary in Shoe Lane. A week of taverns soon qualified him for another year of night cellars. Such was the life of Savage, of Boyse, and of a crowd of others. Sometimes blazing in gold-laced hats and waistcoats; sometimes lying in bed because their coats had gone to pieces, or wearing paper cravats because their linen was in pawn; sometimes drinking champagne and Tokays with Betty Careless; sometimes standing at the window of an eating-house in Porridge Island, to snuff up the scent of what they could not afford to taste; they knew luxury; they knew beggary; but they never knew comfort. These men were irreclaimable. They looked on a regular and frugal life with the same aversion which an old gipsy or a Mohawk hunter feels for a stationary abode, and for the restraints and securities of civilized communities. They were as untameable, as much wedded to their desolate freedom as the wild ass. They could no more be broken into the offices of social man than the unicorn could be trained to serve and abide by the crib. It was well if they did not, like beasts of a still fiercer race, tear the hands which ministered to their necessities. To assist them was impossible; and the most benevolent of mankind at length became weary of giving relief which was dissipated with the wildest profusion as soon as it had been received. If a sum was bestowed on the wretched adventurer, such as, properly husbanded, might have supplied him for six months, it was instantly spent in strange freaks of sensuality, and, before forty-eight hours had

elapsed, the poet was again pestering all his acquaintance for twopence to get a plate of shin of beef at a subterraneous cook-shop. If his friends gave him an asylum in their houses, those houses were forthwith turned into bagnios and taverns. All order was destroyed; all business was suspended. The most good-natured host began to repent of his eagerness to serve a man of genius in distress when he heard his guest roaring for fresh punch at five o'clock in the morning.

The Universities were so much alarmed at the consequences of the ruling in *Donaldson* v. *Becket*, that in the year 1775 they applied for and obtained an Act of Parliament securing to them and the colleges of Eton, Westminster and Winchester, in perpetuity, their rights to all the copies given them theretofore or which might be afterwards acquired.[1]

But the booksellers found themselves in a deplorable state, for, relying on *Millar* v. *Taylor*, and the perpetual common law copyright there held to exist, many of them had invested their whole fortunes in copyrights, only to find them rendered worthless by the decision in the House of Lords in *Donaldson* v. *Becket*. They applied to Parliament for relief in a petition setting forth:

That by an Act passed in the 8th of Queen Anne, for the encouragement of learning, by vesting the copies of printed books in the authors and purchasers of such copies, during the times therein mentioned, the authors or proprietors of such books as had been then printed were to have the sole liberty of reprinting and publishing the same, for the term therein mentioned; and that the petitioners have constantly apprehended that the said Act did not interfere with any copyright that might be invested in the petitioners by the common law; and have, therefore, for many years past, continued to purchase and sell such copyrights in the same manner as if such Act had never been made; and that the petitioners were confirmed in such their apprehensions, in regard that no determination was had during the period limited by the said Act, in prejudice of such common law right; and the same was recognized by a judgment in the court of King's Bench, in Easter Term, 1769; and that, in consequence thereof, many thousand pounds have been, at different times, invested in the purchase of ancient copyrights, not protected by the statute of Queen Anne, so that the support of many families does in a great measure depend upon the same; and that, by a late decision of the House of Peers, such common law right of authors and their assigns hath been declared to have no existence, whereby the petitioners will be very great sufferers through their former involuntary misapprehension of the law; and therefore praying the House to take their singularly hard case into consideration and to grant them such relief in the premises as to the House shall seem meet.[2]

Nothing can show as clearly as the debates on the Bill for the relief of the booksellers, the hostility which met any proposal to protect literary property.

[1] 15 Geo. III, c. 5. Note 2 Brown P.C. 145.
[2] 17 Cobbett, *Parliamentary History*, pp. 1077, 1078.

Mr. Attorney-General Thurlow was against literary property. He said the booksellers were a set of impudent, monopolizing men; that they had combined together and raised a fund of upwards of three thousand pounds in order to file bills in chancery against any person who should endeavour to get a livelihood as well as themselves; that they had purchased copies from Homer down to Hawkesworth's *Voyages*, which, he said, was very low indeed; that Hawkesworth's book, which was a mere composition of trash, sold for three guineas by their monopolizing. He observed that the booksellers were highly censurable in relying solely upon the decision of the Court of King's Bench and in not taking counsel's opinion whether they had a right in copies or not. He said that they had not proved anything in the committee, neither did he think they had any claim to the protection of the House. Dr. Dunning answered his objections:

> Were the booksellers, he said, to go dancing about town, to all the coffee houses and inns of Court to ask attornies' clerks whether a decision in their favour in the court of King's Bench was binding or not? No; they relied solely on the opinion of Lord Mansfield, whom they thought superior to any other advice they could receive.

He said that his honourable and learned friend, the Attorney-General, not a month since was of opinion that the London booksellers were in the right; but, since the decision of the House of Lords, and Mr. Donaldson had become his client, he had changed his opinion.

Mr. Greaves said he had attended the committee and found that the person who was examined as a witness was a party concerned; that he had put a considerable number of questions to him concerning what the booksellers had lost by the late final determination of the House of Lords, but he could get no direct answers; that it was shameful to allow monopoly in books; they might as well allow a monopoly of anything else; that monopolies alway enhanced the price of goods; that the fear of being undersold by the booksellers of Edinburgh was idle, for no person would purchase an Edinburgh book when he could get an English one, for the Scotch editions were generally incorrect, and not fit for a gentleman's library.

Mr. Wedderburn, then Solicitor-General, and, as Boswell says, under the tuition of Sheridan and Macklin, was succeeding finely in getting rid of the "coarse part of his Scotch accent," answered Mr. Greaves, and stood up for his countrymen. He said it was a mistake to say that Scotch editions were incorrect, and nobody bought them, for persons must buy them before they could find out the faults, and "the lowness of price is a great temptation." As to the petitioners being reprehensible for not having taken counsel's opinion, he contended, that was idle, for, as the honourable gentleman (Mr. Dunning) had said, were they to inquire of an attorney when they had the opinion of the first judge of the kingdom? He observed that the Attorney-General could not be

serious in what he had alleged; that, as to the witness being a party concerned, he was not, for he had proved to the committee that he had sold the copyright he had bought for twelve thousand pounds to his son for nine thousand pounds, and that by the late decision in the House of Lords it was imagined it would not sell for four thousand pounds.

Colonel Onslow (this is the same Colonel Onslow who, after the Wilkes affair when newspaper publishers were being haled before the House for contempt in reporting debates, apologized to his brother members for showing them poorer sport than he could wish in being able to bag only three brace of printers), said he would inform the House the reason why Mr. Johnstone, the witness, did not answer the questions: it was because they were improper; that he was present in the committee at the time the questions were asked, one of which was: "Have not the booksellers entered into a combination to prosecute any person that shall reprint their works?" He said he told the committee then that if the member insisted on his question he should put one, which was: "How many acts in your life have you committed for which you deserve to be hanged?" He said he only remembered one instance of such a question being put, which was at Guildford, where an old fool of a criminal was brought before an old fool of a justice for horse-stealing. The justice, who was in his dotage, said to the criminal: "I suppose you have many times stolen cows and calves as well as horses, ain't you?" The criminal, being tired of his life, but not having resolution enough to put an end to it, replied: "Yes, an' please your honour." The consequence was, the man was hanged. He said the committee drove the witness out of the room with a flaming sword, like the angels driving out Adam from the Garden of Eden. He spoke much in favour of the booksellers, and said he heartily wished they might have relief.

Edmund Burke said there could not be a clearer proof of the justice of the booksellers' cause, or a stronger reason for them to think themselves right, than Judge Blackstone's selling his book to a bookseller for a large sum, and afterwards maintaining the opinion of the booksellers' rights to literary property. He spoke much in favour of Blackstone's *Commentaries*, which he said were now, and always would be, esteemed; and when the booksellers had the opinion of so able a judge on their side, he thought they had a just right to imagine themselves secure in purchasing a copyright. He was exceedingly caustic in his remarks about the Attorney-General, who, he said, was now an ornament to the bar, and he made no doubt, from his conduct, but he would soon become an ornament to the Bench. He said he would give his hearty consent to a Bill being brought in.

On the second reading of the Bill petitions against it were presented. Sir John Dalrymple appeared on behalf of the opponents. He began with declaring that a large number of the men who had signed the

petition for the Bill were proprietors of those infamous newspapers which had traduced the sovereign and abused the members of each House of Parliament. He asserted that they entirely governed the newspapers ; and that, after having in the most barefaced and scandalous manner abused every gentleman present and every person in existence, the old for not being young, the young for not being old, the poor for not being rich, and the rich for not being poor, after having called a man a scoundrel if he accepted a place, and a fool if he resigned it, after having vented every calumny which impudence and ignorance could give birth to, he said they came now and asked favour from the very objects of their abuse. Of late, he admitted, there had been an alteration in the public prints, and scandal and traduction had less prevailed ; he would inform the House the reason why there was such a cessation of abuse, where it began and when it would end. It began as soon as the present Bill was thought of, and it would end as soon as it was disposed of. He advised the members to throw out the Bill for that reason ; for, while the booksellers had the Bill in pursuit, they would keep the newspapers free from scandal, and every man might read them with safety. At any rate, he hoped the House would grant the monopoly prayed for, for seven years only, by which means the terms would expire a year before the next general election but one, and they might, in the Parliament after, grant a fresh monopoly for seven years more ; by such a measure the members would be sure of being abused only for six years at a time. If they granted the Bill he would advise them to read no newspaper all the summer, to avoid being themselves traduced. For his part, on account of present remarks, he had ordered that no English newspaper should come within his doors for three months.

Colonel Onslow confined himself to answering Sir John Dalrymple's arguments, against the force of which he said he would pit the baronet's opinion before the late decision, when he sold his own memoirs for £2,000 ; yet, lawyerlike, he pleaded against his own opinion :

> What he had urged at the bar respecting the Greeks and Romans writing only for fame is very true, but it is also true that the lawyers of that day were wont to plead without fees. Lawyers of this day take a middle path ; they are glad to have some money as well as some game ; without pay, soldiers will not fight, and without it the clergy has not spunk enough to pray.

There appeared, among the persons who had signed the different petitions against the Bill, weavers, old-clothes folk, chandler's-shop men and women, and a person who kept the stall upon the wall in Parliament Street. The House was a scene of laughter during the whole of the evidence, which was very long.

Mr. Wallace, solicitor for Mr. Donaldson, was then called in, and stated that it had cost Mr. Donaldson a thousand pounds in thirteen different chancery suits which had been brought against him by the London booksellers ; but, on explanation and cross-examination, it ap-

peared that many of those suits were for printing books that were protected by the statute of Queen Anne, two in particular, Shenstone's *Works* and Yorick's *Sermons*.

Arthur Murphy, one of the counsel for the opponents of the Bill, made his remarks upon the evidence. The booksellers, he observed, were remarkable for mistaking the law; two of them, some time since, employed one, Gurney, a shorthand writer from the Old Bailey, to take down a farce universally approved of and much followed. This farce was called *Love à la Mode*, and Mr. Macklin, the author of it, found it to his interest to keep the copy in his closet, and not to publish it; but two of the petitioners for the Bill, taking a liking to it, accommodated Mr. Gurney with a convenient seat in the shilling gallery of the theatre on one of the nights on which it was acted, and in a periodical publication the first act was soon afterwards retailed. Mr. Macklin remonstrated with the two petitioners on the illegality of their conduct and the unfairness of pirating an unpublished copy, and the only answer he could get was that it was their property, they had purchased it of Mr. Gurney for two guineas, and therefore they had a right to print it. Mr. Macklin applied to the Court of Chancery, an injunction was immediately granted by Lord Northington, and that injunction was made perpetual by the Lords Commissioners of the Great Seal in 1770.[1] At length, therefore, the petitioners were convinced that they had mistaken the law.

Charles James Fox, with an evident purpose to liven up the proceedings, proposed that a witness be asked "whether it was his opinion that if the invasion of copyright was deemed felony without benefit of clergy, it would be for the benefit of the public?" This question nearly started a riot.

Counsel and witness were again ordered to withdraw. Mr. Dunning hoped the honourable member would not urge so absurd a question; Mr. Burke solicited a withdrawal; Mr. W. Burke emphasized the complex nature of it; Mr. Turner urged similar arguments; Mr. Walsh and Mr. Moreton hinted that they would move the adjournment, if the question were not withdrawn. Mr. Fox, however, persisted in desiring it to be put. The witness and counsel were again called in and it was put, when Mr. Wilkie, the witness, said he hoped the honourable House would excuse him from answering the question, a proposition which was almost unanimously agreed to. His examination was then closed, and Mr. Murphy arose to reply to what had been urged by the petitioners. As soon as Mr. Murphy had finished a debate arose whether the Bill should be committed, or whether the House should be adjourned.

Mr. Burke spoke in favour of the petitioners for some time; he instanced the sale of Blackstone's *Commentaries*:

> If [he said] the University of Oxford, one of the eyes of the kingdom,

[1] *Macklin* v. *Richardson*, Ambler 694.

chose him the professor of laws, allotted him the task of instructing youth in the most important of all studies; if the King afterward appointed him to distribute justice and interpret the laws; if he sold his copy, was it for a bookseller to question his title? But this is only one instance out of many; the petitioners have sustained a loss, they are men in distress. The question is, what sort of relief we ought to grant? The learned advocate has told us that glory is the only reward sought by the Scotch booksellers. Let them have their glory—let the petitioners have their property—we will not quarrel about terms.[1]

The opposition was too strong, and the Bill was defeated. The levity which characterized the discussion, and which I have been at pains to reproduce, was characteristic of the period. Literary property was then a joke; copyright a hateful monopoly; authors, poor grubbing devils who starved in garrets; booksellers a race of sharks; and the whole thing a wild conceit not to be taken seriously.

The general attitude of the legislators of the time was that which Dickens at a later date has so faithfully depicted. It will be recalled that after Nicholas Nickleby had left Mr. Squeers's school and had tramped with Smike from Yorkshire to London, he applied for employment as secretary to Mr. Gregsbury, M.P., of Manchester Buildings, Westminster. In answer to Nicholas's question, what would be expected of him as secretary to a member of Parliament, Mr. Gregsbury, among other things, said:

"I should wish my secretary to get together a few little flourishing speeches, of a patriotic cast. For instance, if any preposterous Bill were brought forward for giving poor grubbing devils of authors a right to their own property, I should like to say, that I for one would never consent to opposing an insurmountable bar to the diffusion of literature among the people—you understand?—that the creations of the pocket, being man's, might belong to one man or to one family; but the creations of the brain belong to the people at large—and, if I was pleasantly disposed, I should like to make a joke about posterity, and say that those who wrote for posterity should be content to be rewarded by the approbation of posterity; it might take with the House, and could never do me any harm, because posterity can't be expected to know anything about me or my jokes either—don't you see?"

"I see that, sir," replied Nicholas.

"You must always bear in mind in such cases as this, where our interests are not affected," said Mr. Gregsbury, "to put it very strong about the people, because it comes out very well at election time; and you could be as funny as you liked about the authors; because I believe the greater part of them live in lodgings and are not voters."

So much for historical parallels. The reception of the idea of protecting the scientist in his discoveries by securing to him some recom-

[1] See the report of the debates in 11 Cobbett, *Parliamentary History*, pp. 1077 and following, from which the foregoing has been condensed.

pense from the use of them, cannot possibly be more hostile than that which met the suggestion that literary property be protected against piracy. The proposed scientific copyright cannot be more vigorously assailed than was literary copyright a century and a quarter ago. The subject-matter is subtle and elusive, and the administrative difficulties in carrying out the proposal are, of course, formidable; but they are not insuperable. The protection of inventions by Letters Patent, well described as the metaphysics of the law, presents the same practical difficulties; but there is a patent system in every civilized country, and the excessive refinement of many of the questions which are frequently presented to Courts for adjudication have not prevented systems of patent protection from operating beneficially, and no one now urges that the inherent difficulty of carrying out these systems is a reason for their abolition. The proposal to protect discoveries in science is, after all, no more than the extension into a broader and somewhat more abstract, but not a different field, of the principle of protection already accorded to other inventions.

INTERNATIONAL PROCEDURE UNDER THE TANGIER CONVENTION.

[*Contributed by* R. Weir Brown, Esq., LL.B.]

Like Cæsar's Gaul, Morocco is divided into three parts, the French Zone, the Spanish Zone and the International Zone of Tangier. This division makes its first formal written appearance in the secret Franco-Spanish Convention of October 3, 1904 (first published by *Le Matin* in November 1911), by which Morocco was divided into two zones of influence, one Spanish and the other French, by a line of demarcation which roughly gave the Mediterranean coast and its hinterland to Spain and all the rest of Morocco to France, but by Art. IX of the Convention it was laid down that the town of Tangier should keep the special character which it derived from the presence of the diplomatic body and its municipal and sanitary institutions. It was to the fact that the residence of the diplomatic missions at the capital, Fez, was neither desired by the Sultan nor by the nations themselves (the question of the safety of Christians in the heart of a fanatical population being alone a sufficient objection) that the diplomatic zone of Tangier owed its existence. When the Sultan's power ceased and diplomats were no longer required in Morocco, finding their natural playing-fields in Paris and Madrid, the question arose, what was to become of their old home, Tangier ? As containing a European population overwhelmingly Spanish (at least 50 per cent.) as a small enclave in the Spanish zone, as facing Spain itself Spain might have appeared to have some claims. But claims unenforced by strength or diplomatic agility count for little, and after the war France, by insisting on the view that by possessing the puppet Sultan she could also instruct him to make claims over Tangier, which she would enforce, succeeded in obtaining as a compromise the consent of England and Spain to the Convention of December 18, 1923, by which the Tangier zone is given a sort of Home Rule under the suzerainty of the Sultan. This zone is, as has been stated, a little enclave in the Spanish zone larger than the Isle of Wight, and not so large as the Isle of Man, and having a population of about the same as the latter isle (some 60,000). Under the Convention special codes of law are to be promulgated and applied to Europeans, residents in this zone. These codes are an effort to construct a system of laws which will give satisfaction to each and every nationality existing in Tangier, which many will say is as hopeless as to try to construct an international religion acceptable by all the existing ones.

But to effect this object more reliance is placed on the machinery for carrying out the code than on the codes themselves, and it is for this reason that the Dahir of procedure (which was published at the same time as the Convention, nearly a year before the appearance of the codes) affords a more interesting study than the actual codes.

The Courts.—The Jurisdiction created by the above Dahir comprises three Civil Courts. At the bottom is a Court of Inferior Jurisdiction with a summary jurisdiction in minor civil cases and also petty crimes.

Above this lower Court is a superior Court dealing with civil, commercial, and more important petty criminal cases. This Court is described as a Court of first instance, but also acts as a Court of Appeal for cases brought from the lower Court.

In cases affecting land this Court is assisted by two Mohammedan lawyers who have no right of vote. Above this is the Court of Appeal composed of three stipendiary judges, and, if the case relates to land, of two Mohammedan lawyers, none of whom must have taken part in any previous proceedings in the case. From the decisions of this Court there is no appeal.

Criminal Procedure.—The criminal procedure is analogous to that usual under French law. In the more important crimes a magistrate, known as the juge d'instruction, having received a complaint, either through the Public Prosecutor or from a private person, examines thoroughly into the case, and if there be sufficient grounds for further proceedings forwards his decisions (*ordonnance de renvoi*) to a section of the Court composed of three magistrates (known in French law as the Chambre des mises en accusation), who, if they consider there is sufficient evidence against the accused, send the case to be tried by the Criminal Court. This Court is to be held three times a year on the first Monday of March, July and November. The prisoner cannot be found guilty without the assent of the President of the Court, who also decides as to the punishment. If the President disagree with the verdict (not the punishment), he can remit the case to the next session to be tried by a stipendiary who has not previously taken part in the proceedings. If, in this second trial, there is not a definite majority against the accused with which majority the President agrees, he is definitely acquitted.

The chief interest of the newly established jurisdiction for Tangier lies, however, not in the construction of the Courts, which are of the same character as is usual in French law, and indeed in most continental systems, but in the precautions which have been taken to safeguard international interests, and to dissipate the fears of national prejudice. These are especially evident in the rules for the selection of judges and juries.

The Judges.—There are to be four stipendiary judges, two English, one French and one Spanish. These are appointed by the Sultan on the nomination of their respective governments, and can be dismissed

only at the request of the Government, by whom they were appointed with the consent of the other stipendiary judges united in General Assembly. Their salary is to be 30,000 francs per annum, with 6,000 francs lodging allowance. The particular functions which each stipendiary is to discharge for the forthcoming legal year are to be determined by themselves annually in General Assembly on October 2, when the legal year begins.

All the stipendiary judges are of equal status, regardless of the functions which they may be discharging.

One stipendiary may undertake several distinct functions. But in criminal matters no stipendiary who has previously taken part in the preliminary proceedings in the case can act as judge.

The Magistrates.—In addition to these four paid judges, two magistrates, one French and one Spanish, appointed on the same terms as the four stipendiary judges, shall be employed in exercising the functions of Public Prosecutor under the names of " Procureurs près le Tribunal Mixte de Tanger."

One of these magistrates shall act as Public Prosecutor in the Superior Court (described in the Dahir as the Court of First Instance), and also in the Court of Appeal, when these Courts are engaged in criminal matters. He participates in the examinations of the juge d'instruction, whose decisions he can controvert.

The other magistrate represents in the same manner the Public Prosecutor in the Superior Court, and the Court of Appeal when engaged in civil matters and in the Chambre des mises en accusation and in the Criminal Court.

Both these functions shall be undertaken annually by each magistrate alternatively.

The Unpaid Judges.—But besides the paid functionaries there are to be assistant unpaid judges, who are to be selected from lists presented by the respective Consuls of all the nations signatories of the Act of Algeciras (Germany, Austria and Hungary excepted), drawn from the notabilities of their nationality, who must be over twenty-five years of age, and have resided for at least a year in the Tangier zone.

These unpaid judges are appointed for three years, which term may be extended.

They can carry on any business or exercise a liberal profession, but they must not be barristers actually practising before the Mixed Court or public functionaries. An assistant unpaid judge can be dismissed by the General Assembly of stipendiary judges at the request of the Consul of the nationality by whom he was nominated.

Two of these unpaid judges are to assist the stipendiary employed in drawing up indictments. Two are to assist the stipendiary acting as President in the Superior Court (tribunal de première instance), and two are to assist the three stipendiaries who constitute the Court of Appeal.

In the unavoidable absence in this Court of one of the stipendiaries

he may be replaced by a third unpaid assistant, but should the two stipendiaries find themselves placed in a minority by the three unpaid assistants, they may ask for a new trial with five new judges who have not previously taken part in the proceedings.

Selection of Unpaid Judges.—The selection of these unpaid assistant judges according to the nationality of the litigants or accused is a matter of most scrupulous discrimination. If the litigants or accused are of the same nationality the two assistant unpaid judges must be of that nationality.

If the parties belong to two different nationalities, each of which has a list of nationals, one unpaid assistant of each of these nationalities must be selected. If the parties comprise more than two nationalities all having lists of nationals, the two unpaid assistants are to be chosen by ballot from these lists.

This ballot shall be made by the President of the section in the presence of the representative of the Public Prosecutor, of the Clerk of the Court, and of the parties themselves or their representatives.

If one of the parties belongs to a nationality which has no national list he should himself designate the nationality of the unpaid assistant or assistant judges by whom he wishes to be tried. If he fail to exercise this choice within the time allotted to him by the President, the latter chooses for him.

In the exceptional cases alluded to above where three unpaid assistants are engaged if the parties belong to two different nationalities, and it is impossible to apply the above rules, the nationality of the third unpaid assistant is decided by ballot in the manner prescribed above.

The rotation in which unpaid assistant judges shall serve shall be laid down by the General Assembly of stipendiary magistrates.

Public departments and companies having their registered offices in Morocco are assimilated to nationals who have no national list and must accordingly designate the nationality of the unpaid assistant judge or judges by whom they wish to be tried.

Selection of Jurymen.—The same careful discrimination is shown with regard to the selection of jurymen.

Annual lists of these are to be prepared stating their nationality.

The jury in the Criminal Court is composed of six jurymen. Where the accused is a subject of the Sultan the jury consists of three subjects of the Sultan, one Englishman, one Spaniard and one Frenchman.

If he belongs to any other nation the jurymen are chosen by ballot from his national list. If he has no national list he can select the nationality by which he wishes to be tried, and the names shall be decided by ballot from the list.

The President of the Criminal Court shall acquaint him with this right ten days at least before the commencement of the session. If the accused does not avail himself of this right within twenty-four

hours of the time when he was apprised of it, the jury shall be composed of two British and of two Spanish subjects, and two French citizens.

Where the accused are of several nationalities, there shall, if possible, be an equal number of jurymen of the same nationality; but, if the accused belong to four or five different nationalities, the vacant place or places shall be designated by ballot to one or two of the nationalities concerned.

Remission of Sentences.—The Sultan, acting on the advice of the representative of the Public Prosecutor, and of the President of the Criminal Court, may remit, wholly or in part, the sentences passed by the Criminal Court.

No capital punishment can be inflicted without the unanimous assent of the stipendiary judges.

Clerks in the Law Courts.—The clerkships in the Law Courts are reserved to Englishmen, Frenchmen and Spaniards of over twenty-five years of age.

The Bar.—The barristers pleading before the Mixed Tribunal of Tangier must be barristers who have been called to the bar of one of the Powers who signed the Act of Algeciras, who have a right of pleading in the Courts of their own nationality, and have been accepted unanimously by the General Assembly of stipendiary judges and magistrates.

Judicial Languages.—The two judicial languages shall be French and Spanish, and the various documents shall be in one or other of these languages, in the case of judgments at the option of the magistrate pronouncing the judgment and for other official documents at the option of the Clerk of the Court. Pleadings must be in French or Spanish, unless the President authorize the use of a third language. Writs or notices in French or Spanish are equally valid even if the recipient states he was ignorant of the language employed. But he can ask for the documents to be officially translated at his own expense.

Foreign Judgments.—All Foreign Judgments delivered in the Courts of any of the nations signatories of the Act of Algeciras are of right executable in the Mixed Court of Tangier.

It will certainly be a matter of great concern to everyone who takes an interest in International Legislation to observe how these rules work out in practice.

THE CONSTITUTION OF MALTA.

[*Contributed by* C. J. Colombos, Esq., LL.D.]

The Malta Constitution Letters Patent, 1921,[1] establish a form of government for which there has hitherto been no parallel in the history of the Empire. Although closely akin to Dominion status, it differs therefrom in one or two characteristics which relate mainly to certain specific reservations on the legislative powers of the Maltese Parliament and to the bestowal of somewhat wider functions upon the Governor as the official representative of the Crown. On the other hand, the Malta Constitution represents such an advanced stage of local autonomy that it cannot properly be classed under any of the existing types of Colonies possessing representative government. Imperial policy has evolved a new form of Constitution which, although standing in a class by itself in certain main particulars, may conveniently be regarded as of Dominion status in internal affairs. During the short period of its existence the Malta Constitution has already served as a precedent for Southern Rhodesia,[2] and it is extremely probable that the Malta model will be largely drawn upon in the future constitutional development of the Crown Colonies as soon as they have attained a corresponding political maturity.

Introductory. — Since 1800, when the Maltese voluntarily placed themselves under the protection and sovereignty of the British Crown, the island has passed through various forms of government. Constitutional reforms have been slow, if progressive. All power was at first concentrated in the hands of the Governor, but in 1835 an advisory Council of Government was constituted on which non-official nominated members served. The Council was reorganized in 1849, and an elective element introduced therein, but the official members were still in a position to command a majority. In 1887 Lord Knutsford granted the desired reform of an elective majority. The change was, however, short-lived, as friction soon arose between the elected and the official members and, by successive amendments, the old regime was restored in 1903. As a protest against a restricted Constitution, the elected members resorted to the abstention policy and for all practical pur-

[1] Papers relating to the new Constitution of Malta, White Paper [Cmd. 1321], pp. 98–117.

[2] The Southern Rhodesia Constitution Letters Patent, 1923 (S.R. & O., 1923, p. 1078).

poses the island was henceforth governed purely as a Crown Colony. Soon after the war, the momentous decision was taken by the Maltese to convoke a National Assembly which, on August 8, 1919, framed a Draft Constitution. The aspirations of the people to control their own affairs was, on the earnest recommendation of Lord Plumer, favourably received by His Majesty's Government, and Letters Patent were issued in 1921 providing for the grant of responsible self-government to Malta.

Diarchical Government.—The new Constitution establishes two concurrent systems of Government. All matters of local and domestic concern are placed, in accordance with the ordinary principles of parliamentary government, under the control and responsibility of the Maltese. Matters affecting, on the other hand, the general defence of the Empire, its foreign relations and the position of Malta as the premier naval station in the Mediterranean, are reserved to the Imperial Government. The legislative and executive powers thus concerned are mutually exclusive. Great care has apparently been taken by the framers of the Constitution to define clearly the exact boundary between the two systems of government. It is obvious that the working of a diarchy is largely dependent on the proper delimitation of the two spheres so as to prevent the possibility of any overlapping or encroachment of one authority upon the domain of the other.

The Governor.—The dualism or diarchy established in Malta is united in the person of the Governor, to whom two different capacities are assigned. In the first place, he is the constitutional head of the autonomous government of Malta, acting on the advice of Ministers directly responsible to the Maltese Parliament. In the second place, he is the supreme executive and legislative authority in all matters reserved to the Imperial Government. Fundamentally, the Governor is the official appointee and representative of the Crown to which he is solely responsible and by whose instructions he is bound. The existence, therefore, in one person of two quite separate functions presents, in a diarchical system of government, constitutional difficulties of great magnitude, although the system may prove successful in actual practice. It is, of course, too early as yet for any expression of opinion as to the working of the new machinery.

The Maltese Parliament.—With the exception of certain specific limitations on its legislative power, the analogy between the Maltese and the Dominion Parliaments is complete. The Malta Parliament is bicameral and consists of a Senate whose members normally hold office for six years, and a Legislative Assembly elected for three years.

The Senate is composed of seventeen members, seven of whom are elected by proportional representation by the qualified electors in the two divisions of Malta and Gozo. The remainder are "Special Members" representing the clergy, the nobility, the graduates, the Chamber of Commerce and the Trade Union Council.

The Legislative Assembly consists of thirty-two members returned in groups of four by each of the eight electoral districts. Election is by proportional representation, every male citizen (Malta has not yet extended the franchise to women) over twenty-one, who can either read or write or is worth £5 a year, having the vote and being eligible for membership.

The Constitution provides for the election of a Deputy President for the Senate and a Deputy Speaker for the Legislative Assembly, at their first meetings and at one and the same time as the President and Speaker, a procedure which is an innovation in the existing system in the Parliaments of the Empire and which has been adopted by the Southern Rhodesia Constitution (s. 11).

With reference to money bills, the Senate has no power of initiation, and may only make recommendations; but any such Bill must be returned to the Legislative Assembly and thereafter the Senate may either accept or reject it, but cannot alter it.

Elaborate provisions are made by the Constitution for the settlement of differences between the two Houses. The rules provide for joint sittings, and for the dissolution, in the case of persistent disagreement, of the Legislative Assembly either alone or simultaneously with the Senate. It is obvious that the framers of the Constitution have desired to give rather wide powers to the Higher Chamber, and that such powers would enable the Senate, whenever it finds itself under the control of the Opposition, to exercise a considerable pressure on the Lower House.

Constituent Powers of Parliament.—Within its own sphere, the Maltese Parliament enjoys plenary and ample authority. Its powers are only limited by the necessity of not violating the division as to the transferred and the reserved matters, religious toleration, the language question and the civil list. In the domain of all other subjects, Parliament may repeal or alter any of the provisions of the Constitution or any Order in Council applicable to Malta; but such repeal or alteration must, in either case, be passed by a two-thirds majority in each House.

As regards the language question, which has proved in the past a perennial source of controversy, the solution adopted is based on the Transvaal Constitution, 1906, where the existence of two official languages presented similar, though not so complicated, difficulties. The Malta Constitution provides that all debates and discussions in Parliament shall be recorded either in the English or the Italian language, at the option of the speaker, but that copies of all laws, amendments or drafts of laws shall be printed in both English and Italian. Both languages are declared for this purpose to be of equal validity and authority. English remains the official language of administration, without prejudice, however, to the use of Italian as a second official language. Italian is retained as the official language of the Courts of Law. English and Italian are recognized as equal languages of culture at the University,

the Secondary and the higher classes of Elementary Schools. The problem is, however, further complicated in Malta by the existence of a third language, the Maltese, whose claims to be used as a language of debate in Parliament and as a medium of instruction in the lower classes of the Elementary Schools have received recognition in the Constitution.

The Cabinet.—The executive power in local affairs is vested in the Governor and a Cabinet, or "Executive Council," of not more than seven Ministers who are at the head of the principal administrative departments. Ministers must have seats in and are responsible to Parliament. Re-election on acceptance of office is done away with. Every Minister has the right to sit and speak in both Houses, but is entitled to vote only in the House to which he belongs. The Governor, and not the Prime Minister, presides at the meetings of the Cabinet, but in all other respects the relations between the Ministry and Parliament follow the constitutional practice obtaining in the United Kingdom.

Judicature.—The independence of judges is safeguarded by the Constitution, which provides that they shall be appointed by the responsible executive and removed only on a resolution of both Houses on the ground of proved misbehaviour or incapacity. It is also provided that their salaries cannot be reduced during tenure of office.

A special duty rests on the judges in well-defined and limited Constitutions because they may be called upon to consider from time to time and in a legal aspect the constitutionality of legislation enacted.

Malta is governed by its own laws, largely based on Roman law as modified by the Napoleonic Code and by local legislation and usage. Appeals lie direct from the Malta Court of Appeal to the Judicial Committee of the Privy Council either by special leave or as of right, on conditions as to the nature and value of the causes laid down in the Order of Council of November 22, 1909.[1]

Imperial Government.—Section 41 (1) of the Letters Patent gives a definition of the "reserved matters" which are placed under the control and responsibility of the British Crown. The necessity for such reservation arises from the position of Malta as a strategic unit of vital importance, and the reserved matters relate mainly to Imperial property and interests, the control and discipline of the naval, military and air forces, the defence of the island, coinage and currency, immigration, naturalization and aliens, postal and telegraphic censorship, and the foreign relations of the Empire except in so far as local legislation may be deemed necessary to extend the application of treaties to Malta.

Reserved matters must obviously differ according to the special interests which it is desired to safeguard. In Southern Rhodesia, the subjects withheld from the local Legislature relate principally to native administration (ss. 39 to 47).

Nominated Council.—The powers reserved to the Imperial Government are exercised by the Governor, assisted by a small nominated Council

[1] S.R. & O., 1909, p. 815.

on which representatives of the naval, military and air forces serve. The Council combines the legislative and executive functions. Laws passed on "reserved matters" are entitled "Ordinances enacted by the Governor of Malta." It was felt, however, that some method of legislation other than Governor's Ordinances was necessary for dealing with matters of Imperial concern, and the power of legislating thereon by Orders in Council has consequently been retained by the Crown.

Privy Council of Malta.—In spite of the clear delimitation attempted in the Constitution between the transferred and the reserved matters, certain subjects still remained which affected both spheres of government. Provision has been made for this contingency, and power has been given to the Governor to refer such matters to the Cabinet and the Nominated Council sitting together. The two bodies when so sitting are styled "The Privy Council of Malta," and a Joint Committee thereof, composed of three members of the Cabinet selected by the Prime Minister and three members of the Nominated Council appointed by the Governor, is also provided for in the Constitution. The functions of the Privy Council are restricted to considering and, if necessary, advising on any matters submitted to it by the Governor.

THE LAW OF AVIATION.

[*Contributed by* WILLIAM LATEY, ESQ.]

THE astonishing developments in aviation since, twenty-one years ago, the first heavier-than-air machine was successfully flown have created the necessity for a new *corpus juris* which, for convenience, may be called the Law of the Air. In a paper so intituled, the writer, in 1921, endeavoured to sum up the then juridical position, both municipal and international, in relation to this subject (*Transactions of the Grotius Society*, vol. vii, 1921). Since that date passenger and commercial aviation has made such rapid strides in Europe and other parts of the world that the need has become ever more pressing for uniformity of aerial law among the nations of the world, lest the conflict of laws that exists, in regard to commerce and shipping generally, be repeated in the case of this new means of communication and transport. Another phase of human flight is its bearing on the problems of warfare.

Air Regulations in Peace Time.—Treating first of aviation law in peace time, one may recall that the principal Powers agreed in the Convention for the Regulation of Aerial Navigation (October, 1919) to the principle of the air space above each State being under the sovereignty of that State, provided that innocent passage in peace time of the aircraft of the contracting parties be mutually permitted. The control of aviation in the United Kingdom is regulated by the Air Navigation Act, 1920, and the Orders in Council issued thereunder. This Act, more or less, defines trespass and nuisance by aircraft, and in effect, with regard to damage to people on the ground, places an aircraft in the category of a "dangerous thing." Thus, it is only necessary to prove *damnum* without negligence. The Admiralty Court will have the same jurisdiction in respect of aircraft as of shipping, and will, no doubt, be aided by the fact that the Rules of the Air, set out in an Annex of the Convention, which are to be applied, have been modelled on the Sea Rules.

For some years, however, the International Law Association's Aviation Committee has been trying to secure some measure of international agreement on this new body of law, with the following results at recent conferences of the Association at which all the leading countries have been represented:

RESOLUTIONS PASSED AT HAGUE CONFERENCE, 1921.

DAMAGE.

That it is desirable that the aerial laws as to damage, trespass, nuisance, etc., should be uniform in all States, and should conform to the following principles:

(1) No action shall lie for trespass or nuisance by reason purely and solely of the flight of any aircraft over any property at a reasonable height, *to be fixed by convention.*

(2) In the event of any loss or damage whatsoever to persons or property *on land or water*, caused by aircraft, the owner and charterer shall be jointly and severally liable without proof of negligence for such loss or damage, provided that the damage or loss was not caused or contributed to by the negligence of the person by whom the same was suffered, and that the aircraft alleged to be responsible for the damage or loss shall be subject to immediate arrest and detention until such security be given as may be required by the Court.

(3) A final judgment obtained in any Court of a contracting State shall be enforceable in any other contracting State subject to *the procedure for the execution of foreign judgments in force.*

[*Note.*—The words in italics indicate additions or alterations made at the last Conference, Stockholm, 1924.]

RESOLUTIONS PASSED AT BUENOS AIRES CONFERENCE, 1922.

(*a*) CIVIL JURISDICTION.

ART. 1.

The airship which is above the open sea or such territory as is not under the sovereignty of any State is subject to the laws and civil jurisdiction of the country of which it has the nationality.

ART. 2.

A public airship which is above the territory of a foreign State remains under the exclusive jurisdiction of the State of which it has the nationality.

A private airship which is above the territory of a foreign State is subject to the laws and jurisdiction of such State only in the following cases:

1. With regard to every breach of its laws for the public safety and its military and fiscal laws.

2. In case of a breach of its regulations concerning air navigation.

3. For all acts committed on board the airship and having effect on the territory of the said State.

In all other respects a private airship follows the laws and jurisdiction of the State of its flag.

(*b*) CRIMINAL JURISDICTION.

ART. 3.

If at the commencement or during the progress of any flight of any aircraft passing over any State or States or their territorial waters, or over the high seas without landing, any person on board such aircraft commits any

crime or misdemeanour, the person charged shall forthwith be arrested if necessary. Such felony or misdemeanour may be enquired into and the accused tried and punished in accordance with the Rules given under Art. 2. The State of the place where such aircraft lands shall be bound to arrest the accused if necessary and to extradite him to the State which has jurisdiction over him.

ART. 4.

Acts committed on board a private aircraft not in flight in a foreign State shall be subject to the jurisdiction of such State, and any person or persons charged with the commission of such act shall be tried, and, if found guilty, punished according to the laws of such State.

These proposed rules for international adoption are now under the consideration of the respective Governments, and also the International Commission for Air Navigation, whose next session will be in London in April.

Amending Article 5 of Convention.—At the Stockholm Conference, in September last, Dr. Simons, head of the German Judiciary, presided over the Aviation Law section. In view of the fact that Art. 5 of the Air Convention, by which contracting States were bound to forbid the flight over their territory of the aircraft of non-contracting States, and kept aloof a number of States neutral in the war, the Conference passed a resolution urging on the contracting States the need of deleting this article. The difficulty was that Germany and other ex-enemy States which have not adhered to the Convention would have been shut out from these neutral States if the latter had joined the Convention. Meanwhile the contracting States have permitted "derogations" from Art 5 by States which accept the Convention in other respects, and the provision is being whittled away still further by a proposal amending Art. 5 which has been ratified by the British Empire and is in course of ratification by enough other States to bring it into force shortly. In effect, therefore, the object of the resolution, to bring about free flying between all the States of Europe, will have been attained.

Laws of War in the Air.—The Stockholm Aviation Law Conference last year, however, mainly concerned itself with the very grave question of the aircraft's function in war. The Committee presented draft regulations intended to limit aerial warfare at the Buenos Aires Conference in 1922, but they were referred back, mainly on the ground that the definition of places which might legitimately be bombarded was too wide. These draft rules, however, were in the hands of the Commission of Jurists, which sat at the The Hague, in 1923, as a result of the Washington Treaty, to consider the rules of aerial warfare. This Commission included representatives of the British Empire, the United States, France, Italy, Japan, and the Netherlands, with Dr. Bassett Moore, Judge of The Hague Court of International Justice, as Chairman. In its report [1] many of the Aviation Law Committee's rules were adopted,

[1] *Parl. Papers*, 1924, Cmd. 2201.

and the final form in which the Committee's rules were submitted to the Stockholm Conference showed substantial agreement with The Hague Report.

In view of the growing menace of the air arm to the lives and property of every civilized country, it is generally admitted (except in military circles), that unrestricted aerial warfare must cease, and rules adopted the breach of which will bring an offending State in conflict with the international conscience. This point is emphasized in a valuable work [1] just published by Mr. J. M. Spaight, who says: "Let there be no mistake about it. Unless air power is regulated and controlled, it will destroy civilization itself." He quotes René Fonck, the famous French "ace," as follows:

> A bombing fleet composed of 500 machines carrying a useful load of 2,000 kilogrammes each could level a square kilometre of a town in a single night. In two or three weeks of war a city as large as Paris could be practically destroyed. The fleet in question would cost less than three warships. If, in lieu of explosive bombs, gas-bombs were used, the disaster would be immense.

Mr. Spaight has faith in the chivalry of the new arm, hardly justified perhaps, after the indiscriminate bombardment of London and other places during the Great War, by airmen who kept up too high to make sure of hitting their supposed objectives, but he proposes an international law rule whereby military objectives may be attacked from the air at all times, and other points of only an indirect military value be subject to such attack only when they can be attacked "without material danger to civilian life."

What is a Military Objective?—The difficulty lies, of course, in defining "military objective," and the Stockholm Conference adopted the following definition in Art. 5 of the proposed Air War Regulations:

> Aerial warfare is legitimate when directed exclusively at the following objectives, *i.e.* military forces, military works, military establishments, camps and depots, including ammunition stores; points on harbours used as military bases; factories engaged in the manufacture of munitions of war; lines of communication or transportation principally and for military purposes.
>
> Where the objectives specified in the preceding paragraph are situated in such a way that they cannot be bombarded without resulting in an indiscriminate bombardment of the civilian population, the aircraft must abstain from bombarding.

This is substantially the same as Art. 24 of The Hague Jurists' Report, and it appears to be as effective a form of words as can be found, short of the impracticable method of forbidding aerial attack on auxiliary services altogether. The Conference agreed that the prohibition, if embodied in a Convention, would debar any belligerent from terrorizing the civil population by bombing. For the rest, the draft rules, as

[1] *Air Power and War Rights.* By J. M. Spaight. (Longmans, Green & Co.). 25*s.* net.

adopted by the Conference, differed very little from The Hague Report, except that they included the following provisions concerning aerial attack on merchant vessels and the right of visit, search, capture, and condemnation:

Aerial attack or bombardment upon any merchant vessel belonging to a belligerent is prohibited unless the merchant vessel first attacks the aircraft, provided always that the right to visit and search and to detain the merchant vessel is reserved to the aircraft, and the right to attack is also allowed if the merchant vessel forcibly resists or attempts to evade or escape from visit and search or detention.

The law of prize applicable to naval capture shall apply to capture by aircraft.

This subject was discussed at length by The Hague Commission, but, agreement being found impossible, no rule was adopted. The Stockholm Rules included an important proviso by which the breach of any of the Articles would be punishable as war crimes, and another by which claims for injury to persons or property caused by breaks of these articles could be preferred by the State of the complainant national against the State of the offending aircraft before The Hague Court of International Justice.

Air Arm and Mass Slaughter.—Reverting to Mr. Spaight's book, a worthy sequel to his *War Rights on Land*, and *Aircraft in War*, one finds in it not only an immense amount of useful material, historical and juridical, such as must ensure its inclusion in every international law library, but also a certain optimism as to the exercise of a humane influence by the air arm. Giving free play to an imaginative pen, he writes:

We are in face of a new force of almost limitless potentialities. Properly trained and directed, it is capable of transforming the whole face of war almost beyond recognition. It can turn the old, crude, blood-letting business into an almost bloodless surgery of forcible international adjustment, to the immeasurable advantage of mankind. . . . The day of the contentions of great armies, those huge mastodons of modern war, is passing away. It is possible that the last of the great historical battles has already been fought; mass slaughter lies buried, one hopes, in the war cemeteries of France and Flanders.

For the reasons which bring the author to these conclusions the reader must be referred to this notable book.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Prerogative of Dissolution.—The action of the Crown on October 9, 1924, in accepting without demur or delay the advice of the Prime Minister that a dissolution of Parliament should take place, in view of the defeat of the Administration on the previous evening in the House of Commons, may be held to dispose definitely of the suggestion that a personal responsibility in this matter rests upon the Sovereign. There is, of course, no doubt historically that the Crown was held to be responsible in this regard by many Victorian statesmen, and, on the advent to office of Mr. MacDonald's Government, Mr. Asquith committed himself to the doctrine that a Prime Minister was not entitled to expect unhesitating compliance with a request for a dissolution. Indeed it was contemplated that, in the event of the Labour Administration which was put in office by Liberal support failing to command a majority in the House of Commons, the situation might arise that a dissolution might be asked for but refused, and instead the leader either of the Unionist or of the Liberal Party invited to undertake the formation of a Ministry. For this view the precedent of the Dominions was readily adduced, despite the obvious difference between the position of the King, as exempt from all possibility of control by superior authority, and the power of the Imperial Government to remove from office any Governor-General or Governor who might make a wrong exercise of his discretionary authority.[1] The action of the King may now be taken to assert the validity of the doctrine that nothing save the gravest cause would justify the Crown in exercising its right to refuse ministerial advice to dissolve Parliament. A dissolution essentially means an appeal to the people, and the people has an immediate means of punishing effectively any Prime Minister who advises one, and of whose policy it disapproves. This is doubtless, on the whole, the wisest procedure ; the proposals of determining the life of the House of Commons absolutely, excluding the power of dissolution altogether, or of giving it a veto on its dissolution, might easily in the long run prove more disadvantageous than the existing system.

Contrast between British and Dominion Practice.—The distinction between British and Dominion practice is admirably illustrated by the

[1] *Cf.* Keith, *The Constitution, Administration, and Laws of the Empire*, pp. xiii, xiv, 209, 210.

almost contemporary events in the State of Victoria. A general election took place there in June 1924, when the Labour Party obtained 28 seats, the Nationalists 24, the Country Party 12, and there was one Independent. The previous state of parties had given Labour 20 and the Nationalists 32, so that the tendency to Labour was marked, and was in harmony with the general trend of opinion in the Australian States. The Nationalist Government did not resign, but remained in office until defeated in July on a formal vote of censure, when a Labour Government took office. This in turn was defeated in November on a vote of no confidence by 34 votes to 28. The leader of the Labour Party then asked the Governor to give him a dissolution. In favour of this request it could be argued that, in the first place, the last election had shown a distinct trend towards Labour, and a new election might easily give a working majority, and, secondly, the majority was composed of two very distinct fractions of opinion which but a few months before had been hopelessly at variance, so that a stable administration was out of the question. The Governor, however, declined the request, and entrusted the work of forming an administration to the leader of the Country Party, who had moved the vote which brought about the fall of the administration. It is easy to see how invidious is the burden thus imposed by constitutional usage on the Governor; as he must use his discretion, he can hardly fail to incur criticism whatever his decision, and the mere fact that he has the discretion prevents that full confidence between him and his ministers which is the essential feature of British cabinet government. A Premier cannot be expected to discuss freely his difficulties with a Governor, who cannot fail to be influenced by his knowledge of them when he comes to consider the question of the grant of a dissolution. As matters stand, the Governor who gives a dissolution without mature deliberation and taking personal responsibility is clearly ignoring the conventions of the constitution, and a change in this regard can be introduced only when Dominion opinion becomes ripe for it.

The Status of Newfoundland.—Some interest has been excited in Newfoundland by the declaration of the Premier in the Legislature that the status of the territory was that of a colony, not of a Dominion, and that this was the ruling of the Colonial Office.[1] The matter is, of course, to some extent one of words only. But, while it is true that Newfoundland is a colony within the definition of section 18 (3) of the Interpretation Act, 1889, the same remark applies equally to the great Dominions and to the Irish Free State. The status of Newfoundland does not, therefore, depend on the Interpretation Act, but on the resolution of the Colonial Conference of 1907, which determined to alter its own nomenclature to that of "Imperial Conference," and to style the territories, other than the United Kingdom, represented at its meetings "self-governing Dominions," or, more briefly, "Dominions." That

[1] See *Canada*, November 18 and 25, 1924.

resolution has never been rescinded, and the status acquired by Newfoundland as one of the Dominions cannot be varied except by the agreement of an Imperial Conference. Until 1919 Newfoundland enjoyed in every respect full equality with the other Dominions, but by the decision to secure membership of the League of Nations for the four great Dominions alone, Newfoundland received, as regards international relations, a definitely inferior position to that of those Dominions, as was of course inevitable, having regard to her size and population. But in all other questions Newfoundland remains possessed of the full position of a self-governing Dominion, a term applied to her in British Acts of Parliament, such as the Copyright Act, 1911. The correct title of the territory is either "Newfoundland," or "Island of Newfoundland and its dependencies," though both "Colony of Newfoundland" and "Dominion of Newfoundland" appear to have some official currency.

Territorial Restrictions on Dominion Legislation.—A further step has now been taken to deal with the long-drawn-out controversy as to the extraterritorial powers of the Parliament of Canada.[1] The great delay which has taken place in the matter sheds a somewhat curious light on the constant declarations of Imperial and Dominion ministers of the equal status of the Dominions with the United Kingdom. When it comes to any legislative measure affecting this status, the difficulties in the way of effecting the equality asserted appear to be rather strongly felt. It was as far back as June 1920 that resolutions were passed by both Houses of the Dominion Parliament asking for an amendment in the British North America Act to afford the extension of authority desired; and the request has hitherto remained in abeyance, pending discussions as to the exact form in which the legislation desired should be enacted. As settled after discussion, the Canadian Government on June 30, 1924, moved the House of Commons to ask for the amendment of the British North America Act to the following effect:

> An enactment of the Parliament of Canada, if expressed to operate extraterritorially, shall have, and is deemed to have had, that operation if and in so far as it is a law for or ancillary to the peace, order and good government of Canada.

The Senate and the House of Commons ultimately agreed to the proposal subject to the insertion of the words *intra vires* after "An enactment," the addition being intended to restrict the power of the Dominion to legislation which would otherwise fall within the ambit of its authority and to exclude legislation on any provincial topic. It is obvious that some doubt may exist as to the wisdom of the provision inserted, since it might well be that it should prove desirable that there should be extraterritorial power in respect of some matter adjudged to fall within the sphere of the Provinces, and if so, clearly

[1] *Cf.* this *Journal*, Third Series, vol. ii, p. 328 f.; vol. iv, p. 234.

it would be proper to accord it to the Dominion. The matter, however, is probably not of substantial importance. More serious is the extraordinary nature of the proviso and the failure to make any attempt to avoid conflicts of legislative authority between Britain and Canada or any other Dominion and Canada. It does not seem to be realized that the passing of the Act proposed would give Canada the power to enact legislation binding in theory at least on persons in the British Islands or in any other Dominion. If Canada, for instance, enacted prohibition, she might make it a criminal offence for any person in Britain or in the Bahamas to enter into an arrangement for smuggling liquor into Canada, and under the terms of the amendment proposed the action of such persons would be clearly criminal, since the law would obviously be one ancillary at least to the peace, order and good government of Canada. There will then arise complex issues. In the first place, can legal proceedings be taken against the offender in the place where his offence is committed? In other words can the Dominion Parliament by its new power create a crime justiciable by English Courts? It seems hard to find any principle which would operate to prevent this result; yet it would be very embarrassing for English Courts to have to deal with offences created by Dominion Legislatures, and it would seem desirable, if not essential, if they were to act in this sense, to give them specific powers. In the second place, there can be no doubt that the person committing the offence might be arrested in the Dominion and punished for an offence committed in a place under the local law of which his action was not criminal. Then arises the question whether such a person, if resident at any time in some foreign country, could be claimed for extradition to the Dominion. The difficulties arising here are due in part to the failure to restrict the operation of the proposal to Canadian citizens in the technical sense of the term. If the enactment is passed by the Imperial Parliament, it may be hoped that some restriction will be inserted; failing that, it may be assumed that the Parliament of Canada will exercise its power with discretion and seek to bind only its own citizens or nationals when outside Canadian limits,[1] save in the case of Canadian ships and airships, over which complete authority will naturally be exercised. The power claimed for Canada is greater than that enjoyed or claimed by any other Dominion; the legislation of the Union of South Africa for the mandated territory, even if it is valid, is not based on a general claim of power to legislate extraterritorially, but merely on the fact that the League of Nations has conferred a mandate on the Union which must be held to include the power to legislate.[2] The power of the Commonwealth of Australia, which is granted by the Commonwealth of Australia Constitutional Act, 1900, is restricted to ships whose first port of clearance and whose

[1] Some power may be used over British subjects on ships off the Canadian coast, to punish smuggling.

[2] *Cf.* Keith, *War Government of the British Dominions*, pp. 263, 264.

port of destination are in the Commonwealth. New Zealand and Newfoundland have no extraterritorial powers at all. Those of the Indian Legislature are considerable, but of a special kind, and as their use has been and is under the full control of the British Government, no difficulty of a substantial character has been experienced in practice. It seems clear that the problem is one which ought long since to have been decided by a resolution of the Imperial Conference in regard to all the Dominions and not for Canada merely. A final complication arises in the fact that the powers given to Canada must be extended to the Irish Free State, and the possibility of substantial conflict of legislation becomes far more acute when the matter at issue is one between two territories in immediate proximity. Further, the issue is of special importance in its bearing on the relations of the Irish Free State and Northern Ireland, and on the regulation of Irish fisheries. In this case also the restriction of authority to the case of citizens of the Irish Free State seems necessary in the interests of both that State and Northern Ireland

The Dominions and Foreign Relations.—The practical control of foreign affairs by the Imperial Government, which was strongly exemplified in the action of the Government of Mr. MacDonald in affording recognition *de jure* to the Soviet Government without securing in advance the assent of the Dominions, has again been manifested in the decision to determine British policy towards Egypt without obtaining the approval of the Dominions for the measures determined upon. It is not surprising that in these circumstances the Government of the Irish Free State should have repudiated to the Dail responsibility for the action taken, and that considerable uneasiness should have been felt in Canada at the position in which the Dominion is thus placed. While it is recognized that great rapidity of action must often be essential, it is, on the other hand, pointed out that measures such as those adopted in regard to Egypt form definite links in the chain of European politics, and that they may lead in the long run to complications in which the Dominions are inevitably involved. Equality of status, it is contended, is merely nominal if nothing is done to make the conduct of foreign policy really a matter of joint imperial concern. In this case the fact that the matter is not one which can easily be brought forward before the League of Nations has rendered the position less difficult; but it is pointed out that, if the issue were one which could come before the League, the representatives of the Dominions might find themselves in a position of great delicacy and difficulty, especially in a case in which British action did not appeal to Dominion opinion in general. The conclusion seems inevitable that there is considerable urgency for the progressive improvement of means of consultation between Britain and the Dominions in regard to foreign policy in general. It must be remembered that changes of Government in the Dominions might at any time render co-ordination more difficult to arrange than might be the case

at present. The correspondence, however, just published, regarding the suggestion of an Imperial Conference to consider improved methods of consultation, proves conclusively that neither the Dominions nor the United Kingdom is yet prepared for any substantial step in advance.

The Canadian Recognition of the Soviet Government.—The difficulties which may arise may be easily judged by the fact that the effect of the British recognition of the Soviet Government has apparently not been deemed by the Canadian Government to carry with it recognition by Canada, although the step taken is one which, under international law, clearly bound the whole of the Empire. Thus, formal recognition of the Union of Soviet Socialist Republics was conveyed to their official agent, Mr. A. Yazikoff, in a letter from the Prime Minister, dated March 24, 1924. It is, however, clear that this recognition was internationally neither necessary nor effective. The position was quite clearly expressed by the Prime Minister of the Commonwealth in the House of Representatives on August 19, 1924, when he mentioned that the Soviet Government had been recognized by the British Government without prior consultation with the Dominions, and explained that assurances had later been given by the British Government which gave reason to hold that the error of failing to consult would not be repeated. The action, therefore, of Canada may be regarded as in the light of an assertion of the necessity of due consultation, and an effort to remedy the irregular action of the Imperial Government in binding the whole Empire without securing the assent of its several parts.

Political and Commercial Treaties.—The further negotiations with Russia resulting in the signature of the political and commercial treaties[1] of August 8, 1924, raised a fundamental question which remains of high importance, despite the lapse of the treaties under the refusal of the Imperial Government to accord them ratification. Both were expressed to be between Great Britain and Northern Ireland and the Union of Soviet Socialist Republics. But there is a vital difference between them, in that the political treaty ignores the Dominions, while the commercial treaty makes the customary reference to their distinct position and the possibility of their adherence. In the case of Australia the view has been expressed by Mr. Bruce that the political treaty was one entirely for decision by Great Britain, as her interests alone were affected, and those of Australian nationals were not touched upon. It is, however, clear that this view is not precisely in harmony with the facts. The political or general treaty, in point of fact, contained several clauses directly affecting the Dominions ; thus it included in its purview all claims by British subjects against the Russian Government, and did not reserve those of the Dominions ; it provided for the application of various treaties, some of which, e.g. the convention for the protection of fur seals in the North Pacific of 1911, deeply interest Canada ; and its concessions as to the limits of Russian territorial waters for fishery

[1] Cmd. 2260 and 2261.

purposes would have been operative against all British subjects. Nor is there any doubt that the assurances given on the part of Britain as to refraining from propaganda against the Union of Soviet Socialist Republics were intended by both parties to apply to the whole of the British Empire, just as those by the Soviet Government were to apply to that Empire. The general treaty in fact embodies the recognition of the principle that there are matters in which the Empire must act as a whole if there is to be the possibility of it holding together, while in commercial matters there is the possibility of separate action by the several parts of the Empire. Circumstances have in effect proved too strong for the older view, which declined to attempt to discriminate between political and commercial issues. A very important conclusion, however, follows from these facts: political treaties should not be concluded without full consultation with the Dominions. The fact that the Empire must appear as a unit does not render the Imperial Government entitled to decide that action; on the contrary, it makes full discussion and agreement with the Dominions essential, as in the case of the Washington treaties of 1922. Happily, the management of the reparations discussions may be taken as indicating the realization in some degree of this principle.

The Dominions and the Protocol of October 2.—In the case of matters which fall within the sphere of the League of Nations, the position of the Dominions is effectively safeguarded by the necessity of matters coming before the League Assembly on which they have votes. This provision secures that the question of the acceptance of the Protocol for the pacific settlement of international disputes will be examined adequately, and agreement arrived at between Great Britain and the Dominions before any final decision regarding it is achieved. It is obvious that in one regard the Protocol opens up difficulties for the Dominions from which Great Britain is exempt. Article XV of the Covenant provides that, if a dispute between two members of the League is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement. This provision was generally held to safeguard the Dominions against the possibility of any serious discussion in the League of difficulties arising out of their policy of the exclusion of oriental immigration. The Protocol, however, as determined upon largely at the instance of Japan, expressly provides by Article V that if a question is held by the Council or by the Permanent Court of International Justice, on reference by the Council, to be a matter solely within the domestic jurisdiction of the State whose action is impugned, this decision shall not prevent consideration of the situation by the Council or by the Assembly under Article XI of the Covenant. Thus a question of immigration is made clearly one which in any event may be canvassed from time to time by the Council or the Assembly. Further, a privileged

position is accorded to a power which goes to war against a member of the League on an issue of this kind. Article X of the Protocol provides that every State which resorts to war in violation of the undertakings contained in the Covenant or in the Protocol is an aggressor, and "in the event of hostilities having broken out, any State shall be presumed to be an aggressor . . . if it . . . has disregarded a unanimous report of the Council, a judicial sentence, or an arbitral award, recognizing that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State: nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly in accordance with Article XI of the Covenant." It follows, therefore, that a war arising from an issue of this nature would be one in which the advantages belonging normally to the assailed power would be denied. When it is remembered that this is precisely the one kind of war which is regarded by the Dominions as immediately affecting them, it is not surprising that, so far as public opinion in the Dominions has been expressed, it should have been hostile to the Protocol. In any event, it is manifest that unanimity within the Empire must be achieved, even if it necessitates important alterations in the Protocol. It must be noted also that the Protocol has once more aroused the question whether it is not essential to obtain some recognition of the solidarity of the Empire in the sense that, under no circumstances, could there be any idea of action taken by one member of it against another as a result of the Covenant. It has been found necessary already, in such matters as the Statute on the International Regime of Maritime Ports,[1] to provide by Article XXIII that it is understood that "this statute must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part of or placed under the protection of the same sovereign State, whether or not these territories are individually contracting States." It is still more necessary, in the view of Dominion opinion, to eliminate from the Covenant or any supplementary agreement any provision which may create even the possibility of the emergence of a situation in which one part of the British Empire might be subject to coercion by the League as a whole, including the other parts of British territories. Such a situation may be extremely unlikely to arise; it is not possible to assert that it is inconceivable under the terms even of the Covenant.

The British Commonwealth and the League of Nations.—The issue of the effect of the Covenant on the relations *inter se* of the parts of the Empire is raised in a very definite form by the communication made by the British Government to the League of Nations on November 27, 1924, in reply to a notification from the League of the registration by the request of the Irish Free State of the treaty between Britain and Ireland of December 6, 1921. It is there stated that "since the Covenant

[1] Cmd. 2141.

of the League of Nations has come into force, His Majesty's Government has consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern the relations *inter se* of various parts of the British Commonwealth. His Majesty's Government consider therefore that the terms of Article XVIII of the Covenant are not applicable to the articles of the agreement of December 6, 1921." This notification gives rise to many inquiries. The lapse of time must have permitted free consultation with the Dominions, and it is pertinent to inquire whether the Dominions hold the same view as does the British Government. In special, as the position of the Free State is under the treaty to be that of Canada, it would be of great consequence if the Dominion had expressed its acceptance of the British view, and if the other Dominions had concurred in that position. The claim itself, however natural it may be, is unquestionably not altogether easy to substantiate, and there is some difficulty in the fact that, as has been seen, in conventions concluded under the auspices of the League care has been taken to make it clear that they do not regulate the relations of parts of the Empire *inter se*. If this were plainly to be deduced from the Covenant of the League, the special provision would have been unnecessary, and the silence of the Covenant may be cited against the British claim. The best support [1] which can be adduced for it rests on Article XXI of the Covenant, which provides that "nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration, or regional understandings like the Monroe doctrine, for securing the maintenance of peace." The difficulty, however, arises whether the internal relations of the British Empire can be brought under the heading of regional understandings, when one part of the Empire denies that any such understanding exists. In any event, the matter calls urgently for the definite ascertainment of the views of the Dominions other than the Free State.

[1] *Cf.* Keith, *War Government of the British Dominions*, pp. 157 ff.; *The Constitution, Administration, and Laws of the Empire*, pp. 48 f., 101, 204.

NOTES.

The late Dr. Ernest Schuster.—By the death of Dr. Ernest Schuster, K.C., LL.D., on December 10 last, the Society loses a member whose interest in its welfare was constant, the *Journal* loses a frequent and most able contributor, and the Committee a colleague whose counsel was always helpful.

His family, of German origin, long resident in England, has given us many good and loyal citizens, none more so than himself and his brothers, Sir Felix Schuster, the eminent banker, and Sir Arthur Schuster, F.R.S. Born in 1850, Ernest was educated at Frankfort and Geneva, and took his doctor's degree in Law at Munich. At the age of twenty-three he joined the family banking-house in London, where he acquired a knowledge of commerce and international finance. The bent of his mind, however, was always towards the law and the legal aspects of business, and in 1890 he was called to the Bar at Lincoln's Inn. The years spent in the City had equipped him for the lines of his legal career. His opinion was in constant demand on questions of German law, and in all cases of private international law. Apart from practice, he was at all times studying the legal aspects of commerce, and the effects of foreign and English legislation on business, applying his criticism to proposed amendments of law.

Evidence of the wide scope of his studies was given in books, contributions to legal reviews, and lectures. His books include *The Principles of the German Civil Code, The Wife in Ancient and Modern Times* and *The Effect of War on Commercial Transactions.* He was a frequent and welcomed lecturer at the Institute of Bankers and at the London School of Economics, and wrote articles for Palgrave's *Dictionary of Political Economy.* To our *Journal* (New Series) he contributed some twelve excellent papers, among which may be noted, "The Hague Convention on Matters of Private International Law "(No. 3, p. 438); "Lèse-majesté in Germany" (No. 7, p. 41): "Time Bargains in Stocks and Produce" (No. 13, p. 121); "The New German Statute as to Cheques" (No. 19, p. 79); "History and Present Condition of the German Divorce Law" (No. 22, p. 229); "National Health Insurance in England and Germany" (No. 25, p. 11).

Dr. Schuster became K.C. in 1922, and early in 1924 he was selected as legal adviser to Sir R. Kindersley and Sir W. Acworth for their mission

on the Dawes Report. This, his last work, is thus recorded in *The Times*: "He took an active part in the drawing of the Bills which were accepted by the German Reichstag as the fulfilment of the German obligations under that Report. It was indeed his intense application to the negotiations over the Bills and agreements that laid the seeds of the illness which led to his death."

Schuster was gentle both in manner and speech, a quality which attached to him many friends. He practised philanthropy, according to his means, both generously and wisely, devoting his energies largely to the housing of the poor.

His wife was a daughter of the late Sir Hermann Weber, M.D. She survives him with two sons, Colonel G. E. Schuster, C.B.E., M.C., Financial Secretary to the Sudan Government, and Dr. Henry Schuster. An elder son was killed in the war, serving in the Cavalry. In 1915 when unreasoning popular suspicion attached itself to German names, he and his brother wrote proudly to *The Times*: "One of our sons has already fallen in fighting for this cause; all our other sons and all the other male members of our family who are of military age are serving with His Majesty's forces."

A. G.

The late Sir John Salmond.—Mr. J. Christie, Law Draftsman, in the course of a personal tribute to the late Sir John Salmond, writes as follows:—

My first acquaintance with Sir John Salmond (then Professor Salmond, Dean of the Faculty of Law of Victoria University College, New Zealand) was in the lecture-room; in his lectures in Roman Law, International Law and Conflict of Laws he added to an encyclopædic knowledge of his subject, qualities of imagination and understanding that transformed them from mere academic statements of facts into fascinating considerations of problems of immediate interest and importance. His method in the lecture-room was as admirable as his matter. Every lecture proceeded without hurry and without undue interruption, and was lightened from time to time by play of wit and humour. A reasonably diligent student had no difficulty in reporting the lecture at length, and his book of notes became a treatise in brief, surprisingly free from the "dryness" characteristic of most abridgments. As a Professor of Law, Sir John adopted a practice which was new to us. He was not satisfied to know his students only in the lecture-room, but wished to know the purpose behind their studies; the conditions under which they worked; the standard of learning which they had attained (or failed to attain); and generally the kind of men they were. He accordingly met them individually in his private room after lectures were over, making appointments from day to day with individual students until in this way he had met every member of his class. A little fear and trembling was soon dispelled by his kindly manner and genuine interest,

and what was apprehended as something of an ordeal was remembered as a privilege and a wholly pleasant experience.

His term of service as a Professor of Law in New Zealand was brief; in 1907 he was appointed by the Government of the day to a new office in the Public Service with the official designation of "Counsel to the Law Drafting Office"; in effect he undertook all the duties of a Law Draftsman. He continued in this office for three years and the Statute-books of 1907, 1908, and 1909 are the best records of his official work in those years. The first Bill of importance which he was called upon to draft was an amendment of the law relating to the assessment of land-tax and income-tax. With respect to this Bill, Mr. Allen (now Sir James Allen, the present High Commissioner for New Zealand in London, who was at the time a prominent member of the then Opposition Party, himself a man of letters as well as of affairs and a graduate of St. John's College, Cambridge), paid a high tribute to the quality of the new Draftsman's work. It is not customary for Parliamentarians to go out of their way to praise the Bills which clothe the policy of their political opponents. While Mr. Allen did not fail to criticize the policy of the Bill, he could not but appreciate the quality of the draftsmanship, and from his position in the House said, "I regard the drafting of the Land and Income-tax Bill as one of the most brilliant pieces of legal work ever done in this Colony." Other Acts of even greater importance were prepared by him in those years, notably the Native Land Act, 1909. Prior to the passing of that Act the law relating to Natives (Maoris) and to native land was chaotic. No one professed to be able to say with certainty what the law was, for obscure and inconsistent provisions abounded. Mr. Salmond, as he then was (with no previous knowledge of what the law was supposed to be), studied the mass of legislation then on the Statute Book, held conferences with Native Land Court Judges and other officials, and produced in an incredibly short time a Bill of over 400 clauses which was recognized by all political parties as a masterpiece, and may well be regarded as a model of draftsmanship. I doubt if any of this later work, important as it was, called for a more comprehensive understanding of the subject-matter than did this Bill, or in the result surpassed it in excellence. Although early in 1910 he was promoted to the position of Solicitor-General, he nevertheless continued to supervise the work of the draftsman, and from time to time himself undertook the drafting of measures of unusual importance or difficulty.

Noteworthy enactments drafted by him are the Death Duties Act, 1909 (while he continued to hold office as Counsel to the Law Drafting Office), the Cook Islands Act, 1915, the Land and Income-tax Act, 1916, and the Samoa Constitution Order (now the Samoa Act, 1921). Speaking on the Samoa Bill when it was in the Legislative Council the Hon. the Attorney-General (Sir Francis Bell), paid to its author a glowing tribute in these words:

Now I want to say a word or two about the author of the Constitution Order—the author, in effect, of this Act, though he has ceased to be a servant of the Government of New Zealand. We are extremely fortunate in having had Sir John Salmond as the legal adviser of the Government at the time of the signing of the Treaty of Peace, and this country—and I think I may also say, the Mother-country—is greatly indebted to that great constitutional lawyer for the legal knowledge which he devoted to the initiation of our civil government in this dependency. I would ask honourable gentlemen to think for themselves what might have been the position had we not fortunately had his expert guidance. It is a signal tribute to the estimation in which that great constitutional lawyer is held beyond our shores that the Imperial Order in Council, as drafted by him and telegraphed to London, was accepted by the great lawyers of England and by the Privy Council without one word of alteration. Not only, sir, are our own legislation and our own Order in Council due to his minute particular care, but actually the authority of His Majesty in Council was drafted by Sir John Salmond here and accepted by His Majesty's advisers in London. I do not think a greater tribute has ever been paid to a colonial lawyer.

Of his work in connexion with the drafting of War Legislation I cannot here speak at length. In most cases the conception and the words in which it was expressed were alike his. Everyone who has had experience of drafting will know how far short of the truth is that conception of the draftsman's art which is expressed in the phrase, "putting into legal language" so frequently used by laymen with reference to it. Indeed "legal language" in the sense of "legal jargon" was anathema to Sir John; one of the merits of his work in his office as Solicitor-General was that his advice was expressed in exact and precise but simple terms, so that it was adequately understood by intelligent laymen without knowledge of the technical language of the law.

This tribute would not be complete without an effort to portray the man as well as the official and the jurist. Without being consciously dignified he bore himself with such natural but quiet dignity that all men held him in respect; with many that respect was not without awe, but to those who served as members of his staff he was always affectionately "the Chief." An outstanding feature of his character was his love of truth; his work was marked by orderly thinking, and his language was simple, fitting to the subject, direct and precise. Moreover, he was singularly free from any vanity with respect to his own work. Every alteration or amendment submitted for his consideration was considered on its merits. He judged his own work as impartially as he judged the work of others. He welcomed criticism and took every advantage of it for the perfection of his work, and he invariably expressed his thanks.

This appreciation may fitly be closed with a quotation from a little book of epigrams written by Sir John during a period of convalescence from some minor illness. It is this:

He must have lived strangely free from human follies and sorrows, or

must be strangely hard of heart, who on life's journey can, with steady eyes and an undisturbed spirit, look backward upon the way that he has come. All retrospect is saddened by the pathos of far-off irrevocable days. Therefore let us go forward with our faces to the West, even though it is there that the sun is setting.

Old Age Pension Legislation.[1]—At the sessions of the State Legislatures in 1923, the question of old age pensions was very seriously considered. There resulted from the debate three Acts. Nevada Chapter 70, Montana Chapter 72 and Pennsylvania Chapter 141, and commissions of investigation were appointed in Massachusetts and Indiana. In Illinois the Bill was passed by the lower House but failed in the Senate by a narrow vote.[2] In Ohio a Bill was initiated outside the Legislature, but was not adopted by the people.

While showing sufficient similarity to give evidence of a common model, the three Acts differ greatly in important points. Each statute contains a different solution of the problem of administration. No state administration is set up in Montana, where enforcement is a purely local matter. The pensions are fixed and distributed by the Old Age Pension Commissions of the counties, which are the Boards of County Commissioners. The members act without compensation on old age commissions. The Nevada law, representing the tendency toward centralization, provides for the appointment of a Pension Commission, consisting of the Governor, Lieutenant-Governor, and the Attorney-General, to act without compensation. The Lieutenant-Governor is to act as superintendent of pensions and receives a salary for his service. In each county a board is set up, to be composed of three persons domiciled in the county, but central control is kept as the members are appointed by the governor. In Pennsylvania the system resembles that of Nevada, but the state commission is appointed by the Governor instead of being *ex-officio* ; the members are paid $10 a day while actually engaged in the work of the commission. The county boards, furthermore, are appointed by the governing body of the county, the county commission, not the Governor. In both Nevada and Pennsylvania the expenses of the county boards are borne by the counties.

The administrative differences correspond to the diversity in the way of raising the funds for the pensions. In Montana this is, like the administration, wholly a county matter. The counties are to supply the money from the county poor fund. In the other two States the cost of the pension system is raised on a state-wide basis, but in each in a different way. In Pennsylvania an appropriation is made from the general fund of the State, in Nevada the boards of county supervisors are directed to levy a special annual assessment of two and one-half mills

[1] By J. P. Chamberlain and Sterling Pierson. Reprinted from *The American Bar Association Journal*, February 1924.

[2] *American Labour Legislation Review*, vol. 13, p. 171.

on each one hundred dollars of taxable property in their counties, and to forward the proceeds to the state treasury to go into a special fund from which pensions are to be paid.

The source from which the pensions are to be paid naturally controls the method of fixing pensions in any particular instance. In Montana the local board decides, but in both Nevada and Pennsylvania the state board, acting on recommendation of the local boards, finally determines whether a particular individual is to receive a pension. Thus the preliminary investigation is in every case local, but the State and not the county board passes finally on the payment from the state funds.

The amount of the pension "shall be fixed with due regard to the conditions in each case," but is not to be fixed at an amount which when added to the pensioner's income from any other sources will exceed one dollar per day in Nevada and Pennsylvania. In order to limit further granting of pensions these Acts provide that no pensions shall be granted to a person if the value of his property exceeds $3,000 or, if married, if the value of the property of the two spouses exceeds $3,000. The Montana Act has no property qualifications, but does provide that an applicant must not have an income in excess of $300 per annum. There are further provisions for the protection of the State's financial interests. It is provided, for example, that the commissions may require the assignment or transfer of the applicant's property as a condition precedent to relief, and at the pensioner's death the State is allowed to collect from the property of the decedent the total amount granted to him during his life with interest at 5 per cent. in Montana and 3 per cent. in the other States. Severe penalties are recoverable against the decedent's estate, whenever it appears that he had property in excess of the amount allowed by law, while in receipt of a pension.

But an applicant must have qualifications other than property. In Nevada he must have reached sixty years of age, and in Pennsylvania and Montana seventy years of age. He must have been a citizen of the United States for fifteen years, and resident of the State for at least fifteen years in Pennsylvania and Montana, and ten in Nevada. Montana provides that no relief shall be granted to an applicant if he has, within ten years of making application, been imprisoned for any offence punishable by imprisonment in the State Penitentiary, while Nevada denies a pension to any person who, during the ten years preceding application, has been imprisoned for four months or more for any offence for which he was sentenced to prison without option of a fine. Pennsylvania requires that he must not at date of application be an inmate of a prison, jail, workhouse, insane asylum, or any other public reform, or correctional institution.

Other standard provisions are that the applicant must not be a wife- or child-deserter, that he must not have been a professional beggar or tramp within one year of application, that he must not have deprived himself of property in order to obtain a pension and that he has no one else

responsible for his support and able to support him; and after he has filed his bill of particulars as to his needs and character the applicant is still at the mercy of the local authorities, who investigate him thoroughly and make a recommendation as to whether he shall receive a pension and how much it shall be. Equality of sex is made the rule, as no woman who has deserted her husband can have a pension.

When the certificate is finally granted it is only good for one year and must be renewed annually. This is to assist the commissions in maintaining a check upon pensioners' incomes and property. In Montana the pensions are payable monthly, but in Nevada and Pennsylvania the commission may, in its discretion, pay them monthly or quarterly. All of the Acts provide that the grant of the pension does not confer upon the pensioner any vested rights, and that he holds subject to amending and repealing laws.

Except for one Act of somewhat limited scope, and another confusing old age pensions and poor relief which was held invalid, these are the first States to accept a principle largely embodied in the law of other countries. Great Britain adopted her Old Age Pension Act in 1908,[1] after much agitation and investigation. She acted long after New Zealand, which had provided for relief of old persons in 1898.[2] Australia followed in 1908.[3] The New Zealand Act gave pensions to males of sixty-five and females of sixty, provided that they had resided in the country for the past twenty-five years, and complied with other qualifications as to property, income and personal conduct. The Australian Act made no distinction of age between men and women; for both it was fixed at sixty-five but it introduced a new idea; by pensioning persons of sixty who were incapacitated for work. The British law raised the pension age to seventy, and it and the Australian law laid down stringent residence requirements. All of these Acts provided for central control, with local officers whose decisions are reviewable. Though Denmark, by an Act passed in 1891, adopted the non-contributory old age pension plan,[4] a different system has taken root in the continent of Europe. Germany led the way with an Act establishing a system of old age insurance, by compulsory joint contributions of employers, employees and the State. This system makes it possible to vary the old age annuity for larger or smaller wage earning classes, so that a man earning a larger income during his working life will have a large annuity. It is also necessarily limited to employed persons.[5] Its complication, and the fact that women would not be taken care of under such a system, led Parliament to prefer the straight pension plan. France, however, adopted in 1910 [6] the com-

[1] 8 Edward VII, c. 40.
[2] 1898, Acts of New Zealand, No. 14.
[3] Commonwealth Acts, 1908, No. 17.
[4] *Report of U.S. Commissioner of Labour*, 1909, vol. i, pp. 623–49.
[5] *Id.* App. 1354–444.
[6] Loi de 5 avril, 1910.

pulsory insurance plan, after unsatisfactory results from a voluntary scheme.[1]

The year after the British and Australian Acts went into effect the pension idea made its first appearance in the United States. A special commission was appointed in Massachusetts in 1910 to investigate the subject of old age pensions, and after two years reported adversely to such a system for that State.[2] The same year the New Jersey Legislature passed a joint resolution reciting that "The so-called civilized industrialism of our day can be subject to no stronger criticism than the charge fortified by universal experience that the men and women whose productive energy have contributed so much to our wealth, progress and development, leading simple, inexpensive lives, become in their declining years powerless, principally because they are penniless," and authorizing the Governor to appoint a commission to investigate the conditions of aged persons within the State and make recommendations as to future legislative action.[3]

In 1914 the movement progressed beyond the "investigating" stage, and an initiative measure was adopted in Arizona providing for the abolition of all the almshouses in the State, which were to be sold and the proceeds devoted to old age and mothers' pensions.[4] Section 3 of the Act provided that the State should pay to each man and woman sixty years of age or more $15 per month, during their continued residence in the State, provided that the recipients must be citizens of the United States and residents of the State for five years preceding application, and must have no visible means of support. Section 5 provided for the appropriation out of the general fund of the state treasury of a sufficient amount each year to carry out the provisions of the Act. It was inevitable that the Court should hold this Act unconstitutional because of its indefiniteness, its failure to provide a proper system of administration, and the fact that mothers' pensions were granted to persons who were not indigent and unable to provide for their own support. The case in which its constitutionality was attacked was directed at the mothers' pension provision; but the Court held the entire Act invalid, saying that "While the object of the Act is easily determined from its title and context, the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat. Standing alone, it is not a complete Act, and, unless the existing laws supply its defects or omissions, it is difficult to see how it may be carried into effect."[5] The Court also stressed the practical difficulties and hardships which would result to indigent people who were not within the class designated by the statute to receive pensions if all the almshouses were abolished. "A more

[1] *Old Age Pensions*, A. Epstein, summarizes all of the European laws.
[2] See *Report of Ohio Old Age Insurance Commission*, at p. 271.
[3] See Jt. Res. 1910, No. 1.
[4] See Arizona Acts, 1915, initiative measures, p. 10.
[5] *Board of Control* v. *Buckstegge*, 18 Ariz. 277.

numerous class would be deserted and forsaken under the terms of this Act, if effective, than would be cared for." But it nowhere indicated that old age pensions were *per se* unconstitutional. Indeed, the two opinions seem to indicate that they would have upheld a statute which went into the necessary details of definitions and administration. This trend is particularly noticeable in the concurring justice's opinion.

The following year a law was passed in Alaska providing that any pioneer [1] who had attained the age of sixty-five and had resided in Alaska for ten consecutive years and was entitled to the benefits of certain designated Pioneers' Homes, might make application for an allowance to be paid by the trustees of the homes out of the funds of the homes. The allowance was not to exceed $12.50 per month, and after being granted was not to be diminished in amount, although it might be increased. The allowance was to be paid quarter-yearly by warrants drawn upon the Home's funds in the hands of the Territorial Treasurer, and any unpaid instalments were to become obligations of the Territory. But in order to escape Congressional dissatisfaction the Act provided that no federal funds were to be used for these allowances in the absence of authorization by Congress. Subsequently the benefits of this Act were extended to pioneer women, who were given allowances of not exceeding $25 per month upon reaching sixty years of age, and still later it was required as a condition to granting such relief that the recipient give an affidavit vesting title to all of his property in the Territory of Alaska upon the recipient's death, to the exclusion of all heirs except a surviving spouse living in the Territory. "Pioneer" was defined to exclude Indians.

Further investigations were made by special committees in Massachusetts 1917,[2] Ohio 1919 [3] and Pennsylvania 1919.[4] Senator McNary of Oregon introduced a Bill for old age pensions in the United States Senate in 1919, but it died in committee.[5]

There is little doubt that the constitutionality of old age pension legislation will soon be presented to the Courts. If it is upheld, the experiment now being made in Pennsylvania, Nevada and Montana will be worth careful watching.

Sidelights on the Crisis in India.—Mr. Lindesay Robertson writes that in *Sidelights on the Crisis in India* by Mr. H. Harcourt (Longmans Green & Co.) "there are two chapters which throw much light on the mentality of the Indian civilian, and of the Indian barrister in regard to the administration of the law in India. In his observations on the conduct of trials Mr. Harcourt somewhat fails to grasp the essential functions of the advocate, more especially in criminal cases. He is

[1] Alaska, Laws 1915, c. 64.
[2] See *Report of Ohio Old Age Insurance Comm.*, p. 272.
[3] Ohio Laws 1917, p. 420.
[4] Pa. 1917, Jt. Res. 413.
[5] 66th Congress, 1st Session 1-S, 2803.

obsessed by the notion that if a defence witness lies, and lies freely, the advocate who examines him is in some subtle way *particeps criminis*. The Indian barrister, on the other hand, who, in the form of replies to letters from the author, is responsible for a considerable portion of the work under review, is equally incapable of grasping the true function of a judge. A great deal too much stress is laid on the advantage of an Indian judge having a wide, first-hand knowledge of the customs of the people living within his jurisdiction. If the judge is a Hindu, his knowledge of the manners and customs of his own caste may only mislead him as to those of other castes, and would be no help at all as regards Mohammedans. In any event, if the existence of a 'custom' is in issue, it must be decided on the evidence, not on the personal knowledge of the judge. The fact is that in India the Hindu is, in this connexion, as much a foreigner to the Mohammedan as is the European—and probably as little acquainted with his language.

"There is very much more justification for the criticisms of the 'Indian Barrister' on the combination of administrative and judicial functions, more particularly in the case of the District Magistrate, who is also the chief executive officer of his District. This combination is most pernicious, and is, in the writer's opinion, responsible for more discontent, and gives rise to more distrust of British good faith, than any other cause. It is all very well for Mr. Harcourt to say that there is no warrant in fact for the suggestion that the District Magistrate influences his subordinate magistrates in the administration of their duties, but I doubt if there is any single individual in India, with any knowledge of the subject, who would not equally positively affirm the contrary—the members of his own service always excepted.

"There are many other points of much interest dealt with in these letters, such as the benefits and defects of the codification of laws, the drawbacks of a rigid application of the laws of evidence as embodied in the Evidence Act, which is avowedly based on English law. Most lawyers will be inclined to agree that the provision of the Criminal Procedure Code enabling the judge to question a prisoner, with a view to affording him an opportunity of explaining anything in the evidence given against him, is the best compromise between the alternatives of shutting his mouth altogether, or of exposing him to a ruthless cross-examination.

"There is one statement of the 'Indian Barrister' which cannot be passed over. He says, 'There is among Indians a wide-spread belief, for which there is ample justification, that as between Europeans and Indians it is futile to expect justice in our Criminal Courts.'

"There may be a wide-spread belief to that effect, due no doubt, if it exists, to the persistent vilification of all things English by the extremists on the platform and in the Press, but for an Indian barrister to state deliberately that there is ample justification for the belief shows how deplorably far racial prejudices have been exploited in India. The

writer was nearly thirty years in India, and was concerned in many such cases, sometimes for the prosecution, sometimes for the defence, and sometimes as presiding judge. The accusation is utterly and entirely untrue. In fact, the feeling among the Europeans was exactly the other way; they felt that, in the anxiety of the magistrates and judges to be strictly fair to the Indian, the scales were heavily weighted against the European. The fact is, or at least was, until a few years ago, that in almost every case when a serious charge was made against a European the local agitators used all their endeavours to exaggerate the charge; in consequence, when the case came into Court the story told by the witnesses was so clearly false that an acquittal was inevitable. No one can know this better than an 'Indian Barrister,' and it is much to be regretted that Mr. Harcourt should have given wide circulation to such a calumny, without protest."

Administration of Justice.—It is officially announced that, in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any parts of His Majesty's dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislature of Victoria has made reciprocal provision for the enforcement therein of judgments obtained in the High Court of England the Court of Session in Scotland and the High Court in Ireland, and an Order in Council has accordingly been issued extending Part II of the Act to Victoria.

The operation of the above-mentioned Order in Council is confined to England, Scotland and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of the Irish Free State.

NOTICES OF BOOKS.

THE SUPREME COURT OF THE UNITED STATES.[1]

MR. WARREN'S experience of the difficulties faced by the United States in asserting the rights of a neutral power during the earlier years of the Great War lends special interest to his careful study of the services rendered to the United States by the Supreme Court as a final authority in regard to disputes between States, and to his suggestions for the application of judicial methods to determine questions arising between independent nations. In the interesting history of the Supreme Court few things are of greater importance than the mode in which it has steadily developed the doctrine that, since the States are forbidden to make war on one another, the Court must be prepared to accept the responsibility for deciding all conflicts between them which they cannot dispose of by consent. The first decisive case arose in 1829, when New Jersey and New York were almost at war over the issue of New York Harbour and Hudson River, and up to 1923 thirty-nine controversies had been determined by the Court, of which twenty-six involved boundary disputes, two the recovery of money due on bonds or contracts, and eleven other injuries alleged to have been inflicted by one State on another, whether by unjust embargoes, excessive appropriation of irrigation water, ditching and draining operations, or otherwise. It is important to note that the extension of the power of the Court has been gradual but constant, until now it seems dubious if there is any class of dispute between the States with which it would not attempt to deal. Its popularity in this regard has steadily grown, and the doubts which at one time existed, lest it should prove impossible to enforce its decisions, appear to have now little justification, for the Court holds that the Legislature has certainly authority to pass any enactment requisite to give force to any of its pronouncements. In its action it has refused to treat States merely as ordinary litigants; it has sought to respect their dignity and personality, avoiding all haste in procedure and thus often lessening public feeling and promoting settlement by agreement, or at least acquiescence in its decision. It has also developed a jurisprudence of its own for such cases, in which due regard is had for the common

[1] *The Supreme Court and Sovereign States.* By Charles Warren, formerly Assistant Attorney-General of the United States (1914–18). (Princeton: Princeton University Press, 1924. Pp. 159. 9*s.* net.)

The Supreme Court and the Constitution. By Alan H. Monroe. *The American Political Science Review*, vol. xviii, pp. 737–59.

law, the legislation of the States concerned, principles of international law, doctrines of the civil law, and natural rights.

Mr. Warren draws the conclusion that nations may well learn to hold that to deny that any disputes are justiciable is unwise. He admits, however, that the existing rules of international law require revision, since at present many of the conventional rules hamper effective action by a Court. The difficulty of sanctions he fully appreciates, even if they be merely economic. His own suggestion is that nations should agree that, if any one of them fails to comply with a treaty or a judicial or arbitral decree, so that war results, all non-combatant nations should be relieved of the obligation of performing with regard to the offending power the duties of neutrality.

The power of the Supreme Court is doubtless to be traced in germ in the functions of the Privy Council in advising the Crown as to disputes between different colonies in pre-revolution days. It is possible to hope that some domestic machinery of this kind may ultimately be set up to deal with disputes between the several parts of the Empire which do not lend themselves to other means of agreement.

Mr. Monroe's essay deals with the more domestic issue of the criticisms which have freely been brought, especially of late years, against the powers and acts of the Court in constitutional issues. His carefully balanced argument leaves the impression that there are real dangers in leaving constitutional issues, affecting vitally the power of Congress to enact progressive social legislation, to be decided by the majority of a single judge, having regard to the unquestioned conservatism of members of the Supreme Court and the extreme difficulty of the process of amending the Constitution. The Court, however, is not bound by its own decisions, and it is always possible for it to reverse a principle, however long accepted, if the majority thinks fit, and in the last resort the views of the Court might be changed by additions made to its number under legislative authority. The High Court of the Commonwealth of Australia is in like case, and it is characteristic that both in the United States and in Australia the chief source of discontent with the Courts is the resentment of the Labour organizations with decisions which hamper legislative protection of the workers. It is, however, clear that there is no agreement yet in the United States as to the possibility of remedying the present difficulty, although there seems a good deal to be said for the view that more than a mere majority of judges should be required for a decision annulling an Act of Congress.

A. Berriedale Keith.

THE LAW AS TO C.I.F. CONTRACTS.[1]

In 1872 Mr. Justice Blackburn, in a memorable judgment in the case of *Ireland* v. *Livingston*, said that contracts for the Sale of Goods "at a

[1] *The Law as to C.I.F. Contracts.* By H. Goitein. (London: Effingham Wilson. Price 4*s.* net.)

price to cover cost, freight, and insurance, payment on receiving shipping documents," were very usual, and were perfectly well understood in practice, and he explained their nature and effect. Since then there have been at least a hundred decisions in the English Courts relating to such contracts, some of which gave rise to considerable conflict of judicial opinion, many involving an appeal to the Court of Appeal and a few to the House of Lords. Until recently, however, these decisions have not been collected in any textbook, at any rate in any accessible or complete form, nor have their results been sifted and summarized. C.I.F. contracts, which Mr. Justice Blackburn described fifty-two years ago as very usual, are the means by which most of the overseas trade is carried on. The law relating to them, although part of the general law of contract, has become a special branch, as has the law relating to bills of lading or marine insurance, and for the instruction or convenience of merchants, mercantile lawyers and students, it calls for special and separate treatment. Two small textbooks on the subject have recently been written, one by Mr. Kennedy, K.C., M.P., whose distinguished father contributed so much in what was described in the House of Lords as a remarkable judgment illuminating the whole subject, and the other by Mr. Goitein. The latter has made the difficult attempt to state in about fifty propositions or rules what the decisions have established, and he has done so with remarkable success. The book will be useful to lawyer and merchant alike, and will be welcome for its conciseness and clearness. C. R. DUNLOP.

CARRIAGE OF GOODS BY SEA ACT, 1924.[1]

IN two previous articles in this *Journal*[2] the origin, history, and general effect of the Hague Rules, 1921, were reviewed and explained. It was hoped by many that the Rules would be adopted voluntarily by ship-owners and merchants, as were the York-Antwerp Rules relating to General Average, and that, like the latter Rules, they could, after being put to the test of experience, be reviewed and revised by business men themselves, if, in future, amendments were found to be desirable. The Hague Rules, 1921, have, however, met with a different fate. After various revisions they have received statutory sanction in this country. They are now called Rules relating to Bills of Lading, and they are set out in the Schedule to the Carriage of Goods by Sea Act, which received the Royal Assent on August 1, 1924. By Order in Council dated October 9, 1924, the Rules are not to apply to any contract made before January 1, 1925, or to any bill of lading issued after that date in pursuance of such contract. From that time onwards they will apply to all bills of lading for goods carried by sea from any port in Great Britain or Northern

[1] *Hague Rules Explained: Being the Carriage of Goods by Sea Act*, 1924. By Sanford D. Cole. (London: Effingham Wilson. Pp. xii + 140.)

[2] See *Journal of Comparative Legislation*, Third Series, vol. iv, pt. i, p. 24; vol. v, pt. iv, p. 258.

Ireland. The freedom of contract as regards the terms of bills of lading has disappeared in this country. The rules define the obligations and liabilities of the carrier of goods from this country. With regard to goods carried from other countries it is expected that the rules or similar rules will be applied by similar legislation of those countries.

Mr. Sanford Cole has rendered a useful service in writing a small book in which he explains in the introduction the general scheme of the rules and their history, and then sets out the Carriage of Goods by Sea Act, 1924, and the Rules. The sections of the Act and the Rules are followed successively by a brief commentary or explanatory note. The learned author refers frequently to the views expressed by Sir Norman Hill and other witnesses in their evidence before the Joint Committee of both Houses of Parliament, which reported on the Rules in July 1923. The Rules, however, will have to be construed by the Courts in accordance with the principles applicable to the construction of statutes and statutory rules, and without reference to the opinions of any of the eminent persons who gave evidence before the Committee. The experience of the next few years will show whether the task will be as simple as the supporters of the Rules believe. The Rules to some extent follow the provisions of the American Harter Act, 1893, and to a larger extent those of the Canadian Water Carriage of Goods Act, 1910, which the learned author has set out in an Appendix. To what extent the English and Scottish Courts will follow or rely upon decisions of the American or Colonial Courts on these or similar statutes it would be rash to prophesy, and Mr. Cole has, perhaps wisely, left these decisions alone. It may, however, be predicted with some degree of reasonable certainty that the Rules will give rise to much litigation, and possibly to some surprising or unexpected consequences. When goods shipped under a bill of lading are lost or damaged, the owner or underwriter instead of being barred from a successful claim against the shipowner by the exceptions which have hitherto been usual, though possibly difficult to decipher, in bills of lading, will probably persist in a claim which may be successful if the loss or damage can be attributed to any lack of proper care by the carrier or his servants or agents in the loading, stowing, carriage or discharge of the goods or in making the ship in all respects fit and safe for the reception, carriage and preservation of the goods. If the Rules do not give rise to questions of law they at any rate open wide the gates of controversy on questions of fact.

C. R. DUNLOP.

TUDOR ECONOMIC DOCUMENTS.[1]

THESE three volumes are a sign of the times in the matter of historical teaching. In the days of Macaulay it was almost sufficient that a

[1] *Tudor Economic Documents.* Edited by R. H. Tawney and Eileen Power. Vol. i, *Agriculture and Industry*; vol. ii, *Commerce, Finance and the Poor Law*; vol. iii, *Pamphlets, Memoranda and Literary Extracts*; (London: Longmans, Green & Co. 1924. 15s. net each.)

writer should have a brilliant literary style if he desired to become a great historian. As in the case of the politicians, half the battle was over if he knew the laws of rhetoric. But we have grown into a more sceptical and more cautious people. When the historian endeavours to convince us by fine periods we are inclined to be bored by the eloquence, and ask, rather, for his sources. Instead of being content with the deductions, we ask for the documents from which they are drawn.

But there is a far deeper reason than distrust of the personal judgment of a writer, when we thus ask for the original evidence instead of the secondary deductions. As far as the technique of teaching is concerned, the first-hand document is much more impressive than any amount of brilliant theorizing about it, for the same reason that it is more vivid to live through a battle than to read a war correspondent's sensation of it.

Of this fact these three volumes are repeated and convincing evidence. They deal with a period of history which is sufficiently far away from our own to make it difficult to breathe its atmosphere. The Reformation, with its consequent social and economic changes, cannot be easily translated into modern terms. But if we read of the events in the documents which Mr. Tawney and Dr. Power have so judiciously selected then the effect on the student is very real indeed.

For example, there is a letter (vol. i, p. 18) from Sir Richard Gresham to Thomas Cromwell asking for a conveyance of some monastic lands which had fallen into the hands of the Crown at the dissolution of the religious houses. It is quite a short letter, but it removes the whole so-called "Reformation" from the region of historical theory into realistic fact. It is the same in the case of the reprint of the Star Chamber proceedings (vol. i, pp. 19–39), dealing with complaints against the "new men" who were pushing out the old tenants from their copyholds and immemorial customary tenures. These vast economic processes cannot be summed up by a few generalizing sentences in a textbook. The students must "view the body," as is done at other inquests.

This is not the place to discuss in detail the documents which have been collected for these three volumes. The names of the two editors are sufficient guarantee that the selection has been well made. But a rather serious complaint may be permitted: that, with two such learned and trustworthy editors, we are not allowed to see much more of them. They do not appear personally except for a short introduction, the heading of the documents, with a reference to their source, and a very rare and short footnote.

The *Select Charters* of Stubbs set a very sound model for these collections of historical sources. He wrote at the top of each section or extract a concise note showing its full significance and its place in the historical picture. The same system was used even more successfully by Dr. J. R. Tanner in his recent *Tudor Constitutional Documents*. Dr. Prothero's *Tudor Statutes and Constitutional Documents* had a long

introduction which is brilliant, but not so useful as the note under each heading would have been. It is particularly tantalizing that we cannot have such notes in the three volumes now under discussion, because those of us who have read Dr. Power's recent book of mediæval studies have good reason to know that the notes would have been brightened by wit as well as learning; while Mr. Tawney's comments on Tudor documents would have been of such great value that we might have cheerfully done without many of these documents if it had been necessary to find room for the notes by reducing the text.

Indeed, the editors have expected their student readers to know more than poor average humanity can be expected to know. For example, an extract is given from the Townshend Collection. Is it quite safe to assume that every reader will remember that it is therefore probably (though not certainly) a report of a parliamentary debate? Besides, these volumes are so entertaining that one could wish that they had in view a wider public of readers who would need even more help than the professional students.

With a more liberal amount of commentary these volumes might have been an almost complete history of the most important facts of this critical period. It is probable that by a more intimate union of original documents with editorial notes a sounder method may be discovered for the writing of historical textbooks.

It is unfortunate that one of the very few editorial notes given us (vol. i, p. 231), is an error. A document is quoted as saying that Robertsbridge (in Sussex) is "within three miles of the salt water." The editors' comment is that this must be a "deliberate misstatement," because, they say, Robertsbridge is ten miles from the sea as the crow flies, and more by road. It is strange that they should have overlooked the fact that the river Rother was navigable in those days; indeed Camden, writing of Bodiam, about three miles from Robertsbridge, says that this river "here falls into the sea." What he probably meant was that the tide came up to this spot—which is all that the quoted document claims. To ignore the navigable rivers in our earlier economic history is to overlook a substantial fact, and certainly it was a main point of this document.

The third volume is perhaps of the greatest interest to the general reader. It is full of delightful Tudor literature as well as most instructive Tudor economics. It is somewhat depressing to find that the remedies we are still discussing to-day were already being considered in the sixteenth century. For example, we find proposals for protective duties on imports; a national monetary exchange; and there was the protest against usury which is still with us, and also the cry for a national bank. There is a prayer (from the Book of Private Prayer of Edward VI) that landlords may not take such high rents; and the editors would have done well if they had also reprinted the prayers concerning lawyers and merchants, which are as charming in style as they are

pungent in morals and economics. In this volume also it would have been better if we had been favoured by more of the learned editors' notes. For example, it would have been worth a few lines to warn the reader that *The Tree of Common Wealth* was written by Edmund Dudley while he was a condemned man in the Tower, in the hope of getting his King's pardon. The reference (vol. iii, p. 370) to S.P.D. Eliz. vol. cx, No. 57, is surely an error.

G. R. Stirling Taylor.

INTERNATIONAL LAW.[1]

The late Professor Pitt Cobbett's classical work on Public International Law and the leading cases thereon, went into its third edition in 1909, under the hands of its distinguished author. He added to the former editions systematic notes in order, as he declared, to "ensure a greater continuity of treatment and a fuller consideration of many recent changes both in the subject-matter and literature of international law." The result, as we know, was to illuminate as with a searchlight the leading decisions in that branch of jurisprudence, for Professor Cobbett had a faculty of clear expression excelled by none of the great international jurists of this or any other country. It is probable that no modern textbook was more often cited in the Prize Court decisions than this, and Dr. Bellot is to be congratulated on retaining the substance of Pitt Cobbett's work and only eliminating surplusage, at the same time bringing the decisions up to date in the light of the momentous world's happenings since 1909.

In view of the importance attached to the Permanent Court of Arbitration at The Hague, it is disappointing to find the majority of the awards of that Court (so-called) ignored altogether. Some of these awards, representing as they do political compromises instead of judicial decisions, might have served to show the student of international law how superior the method of judicial findings by a Court, constituted like the present Permanent Court of International Justice, would be to the uncertain rulings of umpires chosen *ad hoc*. The most recent Hague Arbitration Award of any importance was that of September 1920, in an issue between Great Britain, Spain and France on the one hand, and Portugal on the other, in the matter of the expropriated religious properties in Portugal, and it turned largely on the question of nationality. It is mainly of historical interest, being an illustration of the not uncommon case which impels great States to set up an august tribunal to consider the grievance of humble citizens. This arbitration and others would no doubt have received passing mention if Dr. Bellot had not been obliged strictly to limit his additions. Under this head

[1] *Cobbett's Leading Cases on International Law.* Vol. i, *Peace;* vol. ii, *War and Neutrality*. Fourth edition by Dr. H. H. L. Bellot. (London: Sweet & Maxwell, Ltd., vol. i, pp. xxiv + 347; vol. ii, xxxvii + 690. 25*s.* net.)

the Pious Fund Arbitration, 1902, and the Venezuela Arbitration, 1903, figure as the leading cases. For the same reason doubtless no reference is made in the chapters on recognition of States and Governments to the instructive case of *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (1921, 1 K.B. 456), in which the Court of Appeal recognized the Russian Soviets as the *de facto* Government.

In the second volume the decisions of the late war are soundly and thoroughly dealt with, older cases such as *Sparenburgh* v. *Bannatyne* and *The Fox* giving place to their modern equivalents (*Schaffenius* v. *Goldberg* and *The Zamora* respectively), while Zadig's Case (R. V. Halliday, 1917, A.C. 260), in which Lord Shaw delivered his notable *lettres de cachet* speech, is duly commented upon.

WILLIAM LATEY.

EAST AND WEST.[1]

WE owe Sir V. Chirol's new work to the generosity of the Norman Wait Harris Memorial Foundation, whose aim is the promotion of a better understanding on the part of American citizens of other peoples of the world, in order to establish a basis for improved international relations and a more enlightened world order. Under its auspices was delivered last summer in the University of Chicago a series of lectures of which those on *The Orient and the Occident* are certainly not the least important. After a brief review of the historical background of the struggles between East and West, the author sketches the passing of the Ottoman Empire, the relations of Britain with Egypt and India, the new system of mandates as contrasted with the most brilliant example of a protectorate, the French control of Morocco, and touches in conclusion on the new factor introduced by the rise of Bolshevism. The brevity and simplicity of the narratives, which rendered them appropriate for the purpose which they were to serve, have been made possible only by the author's long familiarity with the scenes and peoples of which he writes and his power of seizing on what is essential amid confused masses of detail. Not less admirable are the remarkable impartiality and sanity of his judgments. No attempt is made to ignore the inconsistencies of the Allies in their treatment of the Arab peoples, with the resulting resentment in Syria and Palestine, though, on the other hand, it is recognized that the mandatory system, if applied in the spirit intended by President Wilson, is probably the best solution for the complex conditions prevailing in these territories. Elements of real greatness are discerned in Mustapha Kemal, and to the credit of the Bolshevists is put their rescue of the remnant of the Armenians, deserted by the Allies to the tender mercies of the Turkish State. A trace of personal feeling may be detected in the regret expressed that Lord Milner's scheme for Egypt, in which the author collaborated, failed to be given effect by successive British Administrations, but events since the lectures

[1] *The Occident and the Orient.* By Sir Valentine Chirol (Chicago: The University of Chicago Press, 1924. Pp. xi + 228. $2).

were delivered strengthen his contention that a treaty settlement should long ago have been arrived at. Nor, conscious as he is of the untenable character of Egyptian claims on the Sudan, is the author opposed to the demand for fuller self-government, for the Egyptians in his view "base their claims on a principle which the Occident cannot deny, namely, that it is through freedom and the exercise of independent responsibility that nations can in the long run alone learn to govern themselves"—a doctrine which his American audience cannot have failed to apply to their Philippine dependency.

A. Berriedale Keith.

We have to acknowledge:

The Stabilization of Europe. By Charles de Visscher. (Chicago: University of Chicago Press.) Pp. xi + 190. Price $2.

Germany in Transition. By Herbert Kraus. (Chicago: University of Chicago Press.) Pp. xi + 236. Price $2.

A Treatise on International Law. By William Edward Hall. Eighth edition. By A. Pearce Higgins, C.B.E., K.C., LL.D. (Oxford: At the Clarendon Press.) Pp. xlvii + 952.

The Renascence of International Law. By Manfred Nathan, K.C., LL.D., Grotius Society Publications No. 3. (London: Sweet & Maxwell, Ltd.) Pp. ix + 218. Price 10*s.* net.

Indian Contract and Specific Relief Acts. By the Rt. Hon. Sir Frederick Pollock, Bart., K.C., D.C.L., and Dinshah Fardunji Mulla, M.A., LL.B. Fifth edition. (London: Sweet & Maxwell, Ltd.) Pp. lxxxviii + 1045. Price 38*s.* net.

The Law of Criminology. Tagore Law Lectures. (Calcutta: Calcutta University).

The English and Empire Digest. Vol. xviii. *Descent and Distribution; Discovery, Inspection and Interrogatories; Distress.* Vol. xix. *Easements and Profits à Prendre; Ecclesiastical Law; Education.* (London: Butterworth & Co.)

Précis de Droit International Privé: By P. Arminjon. (Paris: Librairie Dalloz. Pp. 1–247. Price frs. 25.

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Reporter; British Year Book of International Law; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin de l'Institut Intermédiare international; Bulletin mensuel de la Société de Législation comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Edinburgh Review; L'Egypte Contemporaine; Head-

way; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal du Droit International; Journal of the Parliaments of the Empire; Juridical Review; Kathiawar Law Reports; Law Quarterly Review; League of Nations Journal; Madras Law Journal; National Municipal Review; Revista de Ciencia Juridicas y Sociales; Revista de derecho jurisprudencia; Revue de Droit International et de Législation comparée; Revue International de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review.

THE REFORM OF THE SECOND CHAMBER.

[*Contributed by* The Right Hon. Sir John Ross, Bart., LL.D., *last Lord Chancellor of Ireland.*]

Edmund Burke once said, " It is the spirit of the English Constitution, which, infused through the mighty mass, pervades, feeds, invigorates, vivifies every part of the Empire, even down to the minutest member."

" I look upon our Constitution with something more than the reverence with which a man of good taste looks upon an ancient and beautiful building. I look upon it as a temple of the twin deities of Liberty and Order, which Englishmen have so long worshipped, to the glory of their country."

These were the words of Lord Hugh Cecil during the debate on the Bill for the Parliament Act 1911.

In former times there was nothing of which an Englishman was so proud as of our Constitution. The words above quoted represent the feelings of our countrymen down to the year 1911, when a portentous change was effected by the passing of the Parliament Act.

Few persons at the time believed that the Parliament Act, 1911, was to be permanent. It was regarded more as a temporary expedient, as a preliminary to an early reform of the Constitution. Why has nothing been attempted ? Probably because the battle over the Parliament Act, 1911, had been so fierce that all were averse from entering upon it again, until the heat of the controversy had abated.

Constitutional thinkers on the Continent, in the United States and in the Dominions have always taken the view that the Act of 1911 would be soon followed by some reform of the Second Chamber. The situation has now become such that some reform must be effected at an early date. The position of the present House of Lords is not merely an anomaly, but an obstacle to settled government. The electorate has not yet realized that the old constitutional power of that House to protect the people

from sudden revolutionary change has departed, and they have not yet seriously concerned themselves about the measures necessary for putting matters on a safe footing.

The old constitutional balance was completely destroyed by the Parliament Act, 1911, and the subsequent franchise legislation. How are we to set about the reform of our once famous Constitution? We naturally turn to the consideration of the methods successfully adopted by the English-speaking communities, our daughter-States. The popular Assembly in each of these States corresponds, more or less, with our own House of Commons. It is when we come to contemplate the requirements of the Second Chamber that we are confronted with difficulties appearing to many to be insoluble.

Goldwin Smith declared that it passed the wit of man to construct an effective Second Chamber.

But the progressive nations were not to be deterred from a thing necessary for their national salvation; they grappled with the difficulties, and each arrived at a solution that has proved on the whole satisfactory.

The most conspicuous success of all is the American Senate, consisting of 90 members: "The Masterpiece of Constitution-makers."

It is not elected in the same way as the House of Representatives. It is composed of two Senators from each Federal State, chosen by the Legislature thereof for six years. Its legislative powers are immense; not to speak of its judicial and executive potentiality, its authority is co-ordinate with that of the House of Representatives, except that it cannot originate financial measures; but it has the most complete power of amending and rejecting all such Bills. And yet it does not represent the people, but the Legislatures of the Federal States. It has, however, achieved a prestige and a popularity quite equalling that of the House of Representatives, and is generally looked on as the sheet-anchor of the American nation. Inasmuch as the British Empire is not a Federation, it is impossible for us to adopt the American Senate as a model for our reconstructed Second Chamber.

In the Dominion of Canada we have a Federation of a kind, of which the constituent parts are few in number though composed of large territories. The Senators, 87 in all, who are appointed for life by the Governor-General, must have a property qualification, and are removable from the Senate in certain events. Although

it has important powers in respect of financial and other matters, there have been no deadlocks or dangerous conflicts between the two branches of the Canadian Legislature.

The Bill for the establishment of the Australian Constitution was passed in 1900. After long delay, acute criticism and many vicissitudes, it was finally approved of in the Commonwealth. There are many and striking points of difference between the position of the Second Chamber in Canada and in Australia. In the latter the residue of the powers not specifically assigned to the Commonwealth is vested in the States, while in Canada it is otherwise. The American Senate represents the State Legislatures, the Australian represents the peoples of the States, and is in some respects the most powerful Second Chamber in the British Dominions. It has equal authority with the House of Representatives in respect of all proposed laws, but money Bills must originate in the Lower House, and these the Senate may reject but not amend. There are most minute precautions taken against "tacking" and against the introduction of any alien substance into a Finance Bill. The device employed by Mr. Gladstone in 1861 cannot be effective in the Commonwealth, as there can be no "omnibus" Budget under the Constitution. What is of most importance is the power in the Senate, in the case of any Bill financial or otherwise, to force a dissolution and to appeal to the people.

The Constitution of South Africa is widely different from those hitherto discussed. The old adage as to South Africa producing something new applies here: *Αεὶ φέρει Λιβύη καινόν.* Though Federal in appearance like the others, it can hardly be pronounced to be wholly Federal. The Senate of 40 members is partly nominated and partly elective. The unique feature of the Constitution is that the South African Parliament may provide for the ultimate structure and constitution of the Senate.

It can reject, but it cannot amend a financial Bill; as regards all Bills it possesses only a suspensive veto. To avoid deadlocks, there are provisions for joint sittings of the two Houses, and in certain fundamental matters a two-thirds majority is required to make an effective alteration. Each of these Constitutions of the Anglo-Saxon peoples follows what Lord Bryce calls "the genius of the Constitution"—which means something very real to them. Though they differ exceedingly from each other, there is one object of supreme importance aimed at in them all—that every facility and opportunity should be afforded for the exercise of compromise.

The English-speaking races have the faculty of being able to see the other side of the case, and the predisposition to make allowance for the honest views of their opponents. This invaluable quality is inherent in the race and is not possessed by some more logically minded people.

When we consider the history of Constitution-making among the English-speaking races we are at once struck by their grasp of the vital importance of the subject. Nothing can exceed the care and far-sighted attention bestowed on the matter.

At no time, in any of the Dominions, was there substantial opposition to the bicameral system.

It is, therefore, a matter for surprise that in the United Kingdom there has been such apathy and unwillingness to undertake the reform of the Second Chamber. But the unsettled balance of political parties will force the question to the fore-front as a prime necessity of ordered government.

The circumstances in the Home-country are so different from those existing in the Dominions that none of their governmental systems can be taken as a model. Their Constitutions are rigid and defined in writing—our Home Constitution is absolutely flexible, and therefore continually exposed to attack. It cannot be protected by a Judiciary empowered to interpret the Constitution as well as the laws.

The claim of the present historic House of Lords for consideration is a very real one. It enjoys a prestige and a fame that has come down from a period earlier than the Norman Conquest. In order to maintain that prestige, and at the same time to effect a radical reform, I would suggest that the present House of Lords should be authorized from among their own ranks to elect 150 Lords of Parliament, provided that those to be elected have held high office, or have been at some time members of the House of Commons. Then 100 eminent persons should be nominated by the Crown on the advice of the Ministers for the time being. This would bring into the ranks of the reconstructed body men possessing the qualities required in a Second Chamber. Such persons could never, in practice, be procured by any kind of election, direct or indirect.

It is sometimes urged that by a different grouping of the Electorate members could be chosen for the House of Lords possessed of qualities other than those that characterize the members of the House of Commons. This is not a logical or a reasonable method—

it is merely at best a doubtful expedient, on which little reliance could be placed to produce what is required for an effective Second Chamber.

The appointment by nomination would give men representing all shades of opinion, and, if the power were temperately and prudently exercised, we should be likely to find persons selected who are not committed to violent partisanship. The latest experiment, in the appointment of a nominated Senate in Ireland, has so far been a distinct success. Nearly all the great nations in the past have been brought to ruin by fierce party conflicts and intestine dissensions. It surely is essential that a Second Chamber should be swayed as little as possible by party bias.

The introduction of representatives from the Dominions, the Empire of India and the Dependencies of the Crown would give the Chamber a strong Federal and Imperial character.

The admission of such representatives to the House of Commons is not practicable. The calmer atmosphere of the Second Chamber would be congenial. The time is come for satisfying the desires of the great Dominions to enjoy a defined position in the imperial economy. Every year their power, their importance and their wealth increases, and in the future they are destined to become the predominant units of the Empire.

This country would welcome their presence in a House in which the power to impose taxation does not exist. The dignity of these great self-governed countries must now be recognized. The system of representation by Agents-General or High Commissioners is not worthy of their importance. Their representatives ought no longer to be kept waiting at the door of a Colonial Minister. The plan proposed in *The Nineteenth Century and After* (September 1924), would give them a platform from which they can address their advice or their warnings to the Mother-country. We must reflect on the difficulty of the position as regards the Geneva Protocol and matters connected therewith. Are the Prime Ministers to be taken out of their own countries for six months or more, to come over here to discuss this crucial subject ? When they return, another subject equally crucial may have developed. With five or six members in the Second Chamber—always here—constantly in touch with the Home Government and with each other—we would attain to a unity never contemplated before.

The plan referred to above is no doubt vulnerable in many respects. At first sight, everybody says, " We must have something

in the nature of a popular election." This is the last thing for which a popular election is suitable. We require men representing the more permanent qualities of our race, and such men are not procurable in this way.

A more serious objection is that an elected Second Chamber will either be simply an echo of the House of Commons—in which case, it will be useless—or it will have co-equal authority with the House of Commons—in which case it will become a rival, and deadlocks must ensue. That would be intolerable, because the House of Commons must always predominate.

The powers suggested in this scheme are far less than those exercised by the Second Chamber of all other countries. The object aimed at is to enable the reconstructed House of Lords to carry out the real desires of the democracy by having recourse, when necessary, to an election or to a strictly limited application of the Referendum.

Whatever may be the faults of this scheme, can any other be found more likely to lead to orderly and settled government and the safety of the Empire ?

Has the political genius of the British race, which has been a light to all other peoples, departed ? Surely, then, it is incumbent upon our thinking men of all parties to apply their minds to this subject, that we may not be obliged to enter on the dark future without any preparation made to save ourselves and our children from the obvious dangers before us, if the House of Lords be not reformed.

TERRITORIAL WATERS.[1]

[*Contributed by* Sir Graham Bower, K.C.M.G.]

Few subjects in International Law have been more debated than the question of territorial waters. It is a question on which the nations, or at all events many nations, disagree, and it is also a question which is constantly giving cause for disputes owing to contested fishing claims, belligerent rights, or customs authority. With the development of science, the greater power of armaments, and the increased rigour of Customs Laws the question of the marine limits of state authority becomes more and more important, and the whole question calls for settlement. For that reason an article in the *Revue de Droit International*, by Baron de Staël Holstein is welcome.

At the Conference of the International Law Association, held at Stockholm, in September 1924, the neutrality committee of the Association presented a draft Convention for consideration based on a draft project which had been prepared by Professor Alvarez. Dr. Boye, of the Norwegian Supreme Court, submitted a paper which supported the Scandinavian claim to a four-mile limit. This claim was also supported by M. E. Syoberg, of the Swedish Foreign Office.

The Swedish and Norwegian claim of four miles is now controverted by Baron de Staël Holstein, who supports the three-mile limit, recommended by the committee and actually in force in a majority of the States of the world, *e.g.* Great Britain, the United States, France, Germany, Belgium and the Netherlands.

The historical arguments are most ably stated by Dr. Boye and Baron de Staël Holstein, and are a valuable contribution to the examination of the question. But it may be doubted if they would be held to be convincing by Spain, for instance, which has always claimed a six-mile limit, or by Russia, which claims a fishing limit of twelve miles.

All are agreed that there has been diversity of claims in the

[1] *The Extent of the Marginal Sea.* By Henry G. Croker. (Government Printing Office, Washington).

Territorial Waters. By Theodore Boye, LL.D., International Law Association and Report of Neutrality Committee.

Revue de Droit International, 1924. Tome 5, Series 3, No. 6.

appropriation of the waters of the sea. The British claim to the Sovereignty of the Seas, that is, to the Sovereignty of the Bay of Biscay, the Channel and the North Sea was asserted by Queen Elizabeth and only abandoned in 1805. Venice claimed the Adriatic, and Sweden and Denmark the Baltic. The Roman theory that the sea is *res communis* was not accepted in Europe in the Middle Ages, and is not accepted to-day. The problem that presents itself, therefore, is how to reconcile conflicting claims relating to the exercise of acts of authority in certain marginal areas, such claims being based on historical rights, beneficial occupation, administrative necessity or national security. The papers to which we have referred bring out with great clearness the conflicting contentions from the historical point of view, and render a valuable service to students. It is essential to a sound judgment that the arguments on both sides, or on all sides, should be fully set forth, and these papers may be read with great interest and profit. But it is evident, from the conflicting claims and the nature of the arguments in their support, that agreement cannot be brought about by discussion. Controversy may aid the formation of a judicial opinion. It does not promote agreement, and some other line of approach must be adopted if general consent or acquiescence is to be obtained. For we are in presence of claims which the citizens of the States concerned regard as vested rights, and their Governments cannot safely concede those rights to argument.

The claims may be divided under three heads :

1. Fishing Rights.

2. Territorial Waters for which claims of neutrality are put forward as against belligerents.

3. The distance to which Customs Officers may exercise authority.

It seems to be assumed, in the controversy, that Nos. 1 and 2 of the above are necessarily identical. But is that so ? Surely the right to the poultry in our back yard rests on a different basis to the claim to prevent fighting in front of the house. It was held under the Roman law, that the right of a master over his slave was a right *in rem*. The claim that two vessels shall not fight in such a position as to imperil the safety of neutral persons, is a right to forbearance, and may, without undue extension of a reasonable interpretation, be taken as a right *in personam*.

The fishermen at Brighton may reasonably claim a right to such crabs, lobsters or oysters as they can catch within their fishing area, more especially as they, by their taxes, pay for the protection of the

fish in that area. But a Washington Treaty battleship may carry nine 16-inch guns, each with a range of twenty-five miles and firing a high explosive shell weighing a ton and a quarter. A single shell that might miss the enemy and strike a house at Brighton would kill the inmates, destroy the house, and might set the town on fire. Surely the peaceful residents of Brighton, if neutral, would have a claim, *in personam*, to forbearance in respect of any act endangering their lives. Sweden claims jurisdiction over territorial waters within cannon range of her fortresses, but it would seem to be more consistent with humanity to claim a radius of cannon range round all towns.

It may fairly be contended, also, that the historical argument is out of date. Pisciculture has been developed as a science since the range of artillery was adopted as a basis for defining the limits of territorial waters. The golden-edged oyster from which mother-of-pearl is made can be cultivated on shoals or reefs at a distance from the land, far outside the three-mile limit, and, as the shell is very valuable, it would be cultivated if protection was given against poaching. So also with ordinary sea fish. The Americans are showing us how the more edible fish can be cultivated and protected.

It would certainly be in line with the progress of modern science if it was recognized that an area of the sea within reasonable distance of a national shore can be appropriated by a nation, provided the appropriation is for beneficial cultivation and does not conflict unduly with the established rights of other nations.

That such a recognition would add to the wealth of mankind there is not a doubt, for it has been proved by the experience of history that capital can only be invested in development if protected. And, as with fishing rights, so also with belligerent rights. Modern developments call for a reconsideration of the rules. It cannot be supposed that if France and England were neutral States they would allow a belligerent to sow automatic mines outside the three-mile limit in the Straits of Dover, or that the British Government would watch with indifference two contending fleets firing 16-inch shell at one another off Brighton with a population of a quarter of a million in the line of fire.

Modern science and modern developments of artillery and of poison gas and automatic mines have introduced new factors, and it is a reasonable contention that the line of approach to a judicial settlement which would meet with the acquiescence of all is, firstly, by a recognition of a clear distinction between fishery rights and the

jurisdiction over territorial waters, and, secondly, by a judicial inquiry into the nature and validity of all fishing claims. A beneficial occupation of a fishing area, if undisputed for a given period, say half a century, might be considered to establish a prescriptive claim, or similarly an undertaking to cultivate beneficially an unappropriated shoal or reef might secure the grant of a title. Where claims have been established a title could be granted or recognized.

But this inquiry into fishing rights would be distinct from the question of neutral territorial waters. Here other questions arise. In the days of duelling, belligerents adjourned to Chalk Farm or Hyde Park to shoot at one another, but there were practical objections to the exchange of shot in a crowded thoroughfare such as the Strand. The Straits of Dover would probably be considered entitled to the same forbearance as the Strand, for the dangers *in personam* would be identical.

Nor is this all. In October 1916 the German U-boat U 53, took station off the Nantucket lightship, an American lightship anchored outside territorial waters in what is legally the High Seas. The submarine there sank the British steamer *Strathdene*, the Norwegian steamer *Knutsen*, the British steamer *Westpoint*, the Dutch steamer *Blommersdyk*. It is not alleged that the commander of the U 53 violated the Laws of War. He was instructed to comply with American Prize Law, and did so. His proceedings were watched by American destroyers. The fault was in the Law not in the officer. A lightship is established to aid navigation. To utilize a neutral lightship to bait a trap for merchant ships, or even for enemy war vessels, is to divert the lightship from peaceful purposes and to make her a participant, the principal participant, in an ambush. It seems just and right, therefore, that a circle of a given radius should be drawn round all neutral lightships and declared to be neutral territorial waters in which hostilities are prohibited. It is not suggested that the grant of territorial jurisdiction should include fishery rights. For, as has already been explained, fishery rights have a separate origin and a separate justification. The art of pisciculture is in no way connected with cannon range, and is not influenced by the increased power of artillery. France has accepted the three-mile limit for fishery rights, but on October 18, 1912, a decree was issued in France extending French territorial waters for neutrality purposes to 11,111 metres, or six miles. On the other hand, Ceylon accepts the three-mile limit for territorial waters, but claims fishery rights over pearl oyster-

beds from six to twenty miles from the coast. It is evident, therefore, that fishery rights and territorial waters are already divorced and that a neutral lightship would be in danger if a naval action was being fought within short range from her anchorage. Moreover, the Nantucket lightship is not the only example or warning furnished by the late war. The hostilities that took place in the neighbourhood of the Hinden and the Maas lightships furnish equally forcible arguments in favour of an amendment of the law and the creation of a zone of neutral territorial waters round neutral lightships; such territorial jurisdiction to exclude fishery rights. The limits to which the authority of Customs Officers extends vary in different countries, and rarely coincide with the fishery limits of territorial jurisdiction. Under the British Hovering Act (9 Geo. III, c. 35 and 3 & 4 Will. IV, cap. 52), goods cannot be transhipped within four leagues of the coast without payment of dues. In the United States the Customs Officers may enter a ship bound for the States within four leagues of the coast. In Norway, customs surveillance extends to ten miles, and there is a special agreement between the United States and England and the United States and Norway by which the American Authorities have the right to seize liquor smugglers within one hour's run from the shore.

But it is evident that the question has, as a fact, been divided into three distinct subjects : Fishery Rights, Territorial Jurisdiction, and Customs Authority. That the first of these is capable of judicial settlement on the basis of vested or prescriptive rights, that the second and third can be settled by conference having due regard to local and national conditions, and that regional settlements are more likely to find acceptance than a proposal to establish any uniform and universal rule which would involve confiscation of prescriptive rights long enjoyed by hard-working fishermen—rights on which they depend for their livelihood, rights which are likely to increase rather than diminish the food supply of the world. Similarly, in the determination of the limits of neutral territorial waters regional conditions would need regional treatment if the safety of peaceful neutrals is to be safeguarded.

With great deference, therefore, we submit to the authorities who have considered this matter a new line of approach which will not have uniformity as its aim, but will take, as a starting-point, the recognition of vested rights and the progress of science rather than legal maxims or legal principles which are difficult to apply to the world of to-day.

NATIONALITY OF MARRIED WOMEN: PRESENT TENDENCIES.[1]

[*Contributed by* Miss Chrystal Macmillan, M.A., B.Sc., *Barrister-at-Law of the Middle Temple.*]

It is necessary to-day to approach this question from an entirely different point of view from that adopted by our legislators up to 1914. From 1844, when a measure was passed making the nationality of a foreign woman follow that of her British husband till the time of the introduction of the British Nationality and Status of Aliens Bill in 1914, the views of women, and, in particular, of the married women concerned had been entirely left out of account. It is curious that there should have been passed in the same year, 1870, the first of a series of Statutes emancipating the married woman with respect to her property, and another measure which deprived of their nationality British women married to foreigners. The new proposal was adopted in order to make the law of nationality conform to the common law doctrine that the personality of a woman was absorbed in that of her husband, and to bring British law into line with that of most European countries. I do not mean to suggest that there was any direct intention to go against the wishes of women, or even, except since the beginning of this century, that women, apart from individuals, had formulated definite views, but merely to emphasize the point that the mental outlook of the law-maker did not include any conception that those most concerned might have other views, or that these other views should be taken into account.

Work of Women's Societies.—To-day, however, the position is entirely changed. To approach the subject now, without knowing what women are saying and feeling and demanding, or the extent

[1] *Note:* Except where otherwise quoted, the information is taken from the summaries of the law of married women's nationality in 41 countries, given in the Report of the International Woman Suffrage Alliance Committee on the Nationality of Married Women, published in the *International Women's Suffrage News*, of May–June 1923 or of the issue of the same of October 1925 (S. American Countries), and its later issues.

to which they are politically able to give effect to these demands, or how widespread are the ramifications of their organization, both national and international, is to be oblivious to the most important factors in the situation. As to their organizations: the three international bodies which deal with the status of women are all agreed on this subject. What they ask is, that a married woman shall be given the same right as a man to retain or to change her nationality. These are, first, the International Council of Women, a body with national branches in some thirty countries, made up, not of women with advanced views, but of representatives of all types of women's organizations. That Society first took up the question in 1905, when it carried out a special investigation, and has worked for it ever since. Both the Women's International League for Peace and Freedom and the International Woman Suffrage Alliance put this reform on their programmes at their first congresses after the war. The last-named body, which has branches in some thirty countries, has a special committee on the nationality of married women which includes representatives from these two other international organizations, together with individual members from twenty-five different countries, so that women are equipped with the machinery for the interchange of information and for concerted action.

As to political power, apart from the Latin and a few countries of Southern Europe, women have the political vote throughout the countries of the white races.

It may be worth mentioning that it is a mistake to suppose that women's organizations became alive to this question only as the result of the war. As mentioned above, the International Council of Women have advocated the reform since 1905. In this country, it was pressure from the National Council of Women, the Women's Liberal Federation, the National Union of Societies for Equal Citizenship and the Women's Co-operative Guild which compelled the British Government of the day, before the war, to introduce modifications into the British Nationality and Status of Aliens Bill of 1914, although it had been the intention to pass the Bill, which had previously been agreed to by the Dominions, without the change of a comma.

Principles underlying the Women's Attitude; their Answers to Objections.—What, then, are the principles underlying the women's attitude? They find in this country, for example, that no male adult born a British subject can have his nationality taken from

him without his consent. He may marry a foreign woman, and go to her country, but he continues to receive British protection. He may be disloyal in the eyes of the authorities, but he cannot be deprived of his nationality. If another country claims him, this country does not take from him his nationality, unless he has by a voluntary and formal act adopted foreign nationality. And no male adult is admitted to British nationality without bringing evidence to show he is a desirable citizen, and being required to take the oath of allegiance. The feminist asks that the same rules should be applicable to the married woman. Marriage in a woman is not to be treated as a legal disability. Women, they say, are as attached to their nationality as are men, and it is treating it as of little importance if adults can be naturalized without satisfying the conditions as to desirability and without requiring them to take the oath of allegiance. It is insulting to a woman to assume that she can transfer her allegiance without her consent. The disadvantages which result from a loss of nationality vary in different countries; but the major grievance, in every case, is that the loss of nationality and its consequent disadvantages are imposed without the consent of the woman, so that she is without the power to protect herself. It is of interest to note that support for this change comes from a rather unexpected quarter, namely, from the ultra-chauvinists, who find that, by treating a wife as of no importance in this connexion, an undesirable alien may, by marriage with a British man, acquire the right to settle in this country. A foreign woman told the writer, during one of the spells of spy fever in the war, that the only question about which she was required to satisfy the authorities, before being admitted to this country, was the birthplace, not of herself, but of her husband!

It may be said that a woman may wish to take the nationality of her husband, especially if she goes to settle in his country. Of course, this is no less true than that a man may wish to, and very often does, take the nationality of his wife when he goes to settle in her country. The difference is, that in the case of the man it is a voluntary act. He is not compelled to take the nationality of his wife except, as far as the information of the writer goes, in certain special cases in Japan and Brazil; but even in these cases the man is not deprived of his British nationality. He merely acquires a second nationality. The married woman should be recognized, in this connexion, as she has been recognized in others, as an individual adult personality.

Ten years ago the most common objection to change was that it would upset the legal symmetry which by that time had been almost universally established in Europe; that to introduce the change would mean that a British woman married to a foreigner would have two nationalities, and that a foreign woman married to a British subject would be stateless. This objection is of less force to-day, when the United States and Russia and, to a limited extent, Belgium, Norway, Denmark and Sweden have been added to the countries which give to married women an independent nationality. And it will become of less and less force when other countries, as they inevitably will, follow that example.

Then there is the objection that it would be troublesome to give protection abroad to a British woman with an alien husband. But why should the women of a country be denied a privilege given, as a matter of course, to men with alien wives? Other countries do it. The law of the Argentine, for example, as the Foreign Office reported to the Select Committee,[1] says that Argentine women married to foreigners are entitled to "succour and aid from the Representatives of the Republic." It is sometimes said that to give a woman the right to her nationality would be to do away with the unity of the family. In certain connexions it might be convenient to have all the members of one family of one and only one nationality, as it is convenient sometimes that they be all of the same religion, or the same political outlook. This argument may have more force in the countries which base their nationality law on the *jus sanguinis*, but in this country, where we base it partly on the *jus soli*, we do not now always have one nationality in the family. For example, we treat a German and his British-born wife living in this country as aliens; but British law considers their children born in this country as British, and prevents their mother from being of the British nationality of her children. But do the supporters of this form of "unity of the family" really mean any more, by this expression, than "supremacy of the husband"? If they were to argue that a woman who marries a man and goes to live in his country should take her husband's nationality, and that a man going to settle in his wife's country should, in the same way, automatically take his wife's nationality, the masculine bias of his point of view would be less suspect. This argument, too, would have more force if it were possible to forget that "the unity of the family" has always

[1] Cmd. 1923, 115, p. 169.

been the last ditch of the opponents to the removal of the disabilities of married women, whether these concern property, guardianship of children or political rights.

Recent Changes in the Law of Foreign Countries.—In the last few years there have been rapid developments. The adoption of the Cable Act [1] of the United States in 1922, the most important from the point of view of this country, is directly traceable to the political action of the most active women's organization of that country, the National League of Women Voters. At the first presidential election, immediately after the establishment of equal suffrage, this organization put only two items on its programme, of which one was the nationality of married women. The result was, that each of the political parties was compelled to place it on its programme, and in a few months the Cable Act was adopted. By this Act an American woman, on her marriage with a foreigner, retains her American nationality, unless she voluntarily chooses to renounce it. It further reverses the practice by which a foreign woman marrying an American becomes an American, but it provides special facilities for enabling her to naturalize by reducing the necessary term of residence on American soil from five years to one. It further recognizes the independent personality of the married woman by providing that she should not be debarred from naturalization simply because of her marriage. On one point, however, it has placed her in a less good position than a man. It enacts that should an American woman marry an alien coloured man, other than one of African descent, she should lose her American nationality.

Another measure which affects an enormous population is the law recently adopted in Russia. By the first Code of Laws of the Russian Socialist Federal Soviet Republic, in the Section dealing with Civil Status and Domestic Relations, Marriage, Family and Guardianship, it is provided (par. 103), that a woman who marries a Russian does not take her husband's nationality, and a Russian woman who marries a foreigner does not lose her nationality. A married woman can, independently of her husband, become a Russian citizen (confirmed by Decrees of April 5, 1918, and August 22, 1921, on the question of the nationalization of foreigners).

The new Belgian Law [2] of 1922 also takes a small step in the

[1] September 22, 1922 (42 U.S. Statutes at Large, 1021). See, for a criticism of the effects of this Act, *Journ. of Comp. Leg.*, Third Series, vol. vii, pt. i, p. 53.

[2] Nationality Law of May 15, 1922. See also 1922, Cmd. 1771, and 1923, Cmd. 1792.

same direction. The rule that the wife of a Belgian is a Belgian is retained, but Article 18 provides that the woman who marries a foreigner of definite nationality or whose husband voluntarily acquires a foreign nationality ceases to be a Belgian subject if she acquires the nationality of her husband by virtue of the law of his country, unless, being a natural-born Belgian, she makes a declaration within six months of the marriage or of the date of the husband ceasing to be a Belgian. This Act further gives special facilities for the husband of a Belgian woman to acquire full Belgian nationality by reducing the necessary period of residence on Belgian territory from ten years to five. The same special facilities are given to the widower or divorced husband of a woman of Belgian extraction by whom he has issue.

In Norway, Sweden and Denmark, a measure prepared by a joint Commission of these three countries was proposed simultaneously in their respective Legislatures in 1924. Its proposal that a woman should not lose her nationality on marriage with a foreigner, unless she acquired his nationality and ceased to be domiciled in her own country has been adopted in Norway [1] and Denmark.[2] Sweden [3] strengthened the original draft by enacting that a Swedish woman should only lose her nationality on marrying a foreigner if she acquired his and also took up her residence in his country. This means that if such a couple live in either Sweden or any other country not her husband's the wife will retain her Swedish nationality. Each of these countries retains the rule that a foreign woman marrying one of its citizens acquires its nationality. Austria, too, has this year passed a law which, specially because of the United States Act, included a provision that an Austrian woman shall not lose her nationality on marriage with a foreigner, unless by the law of his country she acquires his.

In certain other countries the question has been before the Legislature or the Government for consideration. In France, for example, a Government Bill was voted upon favourably by the Senate so long ago as 1923. It proposed that a Frenchwoman shall not lose her nationality on marriage with a foreigner, unless, in the act of marriage, she renounces her French nationality, and a Bill on these lines is now under consideration in the French Chamber,

[1] Norwegian Nationality Law of Aug. 8, 1924, s. 8.
[2] Danish Nationality Law, 1925, Art. 5.
[3] Swedish Nationality Law of May, 23, 1924, s. 8.

while a second Bill, which includes, in addition, the further proposal that a foreign woman who marries a Frenchman may choose to keep her own nationality, is now before the Senate. In 1923, in the Reichstag, a resolution urging that a German woman should not lose her nationality on marriage with an alien was proposed but was not further proceeded with, because it was considered that the matter could only be dealt with internationally. This year, 1925, a Bill has been presented in the Senate of Cuba, proposing that a Cuban woman should have the right to retain her nationality on marrying a foreigner, and a Bill including the same proposal has just been introduced into the Austrian Parliament by two of its women members.

The British Empire.—In the British Empire women have gained on some points and lost on others. The two most important gains were those introduced into the 1914 British Nationality and Status of Aliens Act.[1] One was that which reintroduced into the law the principle, excluded since 1870, that a woman might be of a different nationality from her husband. It was to the effect that a woman with a British husband should have the right, should her husband change his nationality, to declare that she would remain British. The other was, that a British-born woman with a foreign husband should be able to apply, on the dissolution of her marriage by death or divorce, for readmission to British nationality, without satisfying the ordinary conditions as to residence. The former of these concessions has been to a certain extent whittled away by the Act [2] of 1918, so far as the wives of naturalized British men ordered to be denaturalized by the Secretary of State are concerned. A further small concession applicable only in war time was introduced in the 1918 Act, s. 2 (5) which made it possible for a British-born woman with an alien enemy husband to be readmitted to British nationality, if the Secretary of State consented; but it was passed too late in the war, and given too little publicity, for advantage to be taken of it.

On the other hand, the adoption by Australia [3] and New Zealand [4] of the main provisions of the Imperial Act as they affect married women, means that, in each of these countries, Australian and New Zealand women have lost their former rights to remain British on their marriage with aliens. The question of the

[1] 4 & 5 Geo. V, c. 17, s. 10 & s. 2 (5).
[2] 8 & 9 Geo. V, c. 38, s. 7., A.
[3] Act N2. 48 of 1920.
[4] Act, 1923, No. 46.

British rights of such women outside their own countries does not seem to have been tested in law.

But if there is little to show in legislation, there has, without doubt, been a great change politically, due to the cumulative effect of the steady work of women's organizations all over the Empire, not only directed to their respective Parliaments, but to the Imperial Conference. From Australia, Canada, New Zealand, South Africa, East Africa, Southern Rhodesia and this country, societies have acted together to make representations to the Imperial Conference,[1] that women should have restored to them the right lost in 1870 of retaining their British nationality on marriage with an alien and be given the same right as a man to retain or to change their nationality. The Conference has at last considered the subject, and, while adhering to the opinion that women should, in general, follow the nationality of their husbands, have recommended a small alteration,[2] namely :

> That power should be taken to readmit a woman to British nationality in cases where the marriage state, though subsisting in law, has for all practical purposes come to an end.

The Imperial Parliament, too, following the introduction by Sir John Butcher of a Bill drafted and promoted by the National Council of Women to give effect to their policy has had to consider the question seriously by means of a Select Committee of both Houses. That Committee was unable to come to any agreement, the five Commons members taking one view and the five Lords another. It is significant, however, that the elected members were unanimous in recommending as follows [3] :

> (1) That a British woman shall not lose, or be deemed to lose, her nationality by the mere act of marriage with an alien, but it shall be open to her to make a declaration of alienage, and therefrom she shall cease to be a British subject.
>
> (2) That an alien woman shall not acquire or be deemed to acquire British nationality by the mere act of marriage with a British subject, but that if she or her husband are residing on British soil she shall be entitled to apply for British naturalization without the necessity of complying with the ordinary conditions as to length of residence.

The five Lords who were members were not able to recommend more than the following change [4] :

[1] Report of Select Committee, 1923, Cmd. 115, p. 176.
[2] Imperial Conference, Summary of Proceedings, 1923, Cmd. 1987, p. 292.
[3] Report, 1923, Cmd. 115, p. xxiii.
[4] Report, 1923, Cmd. 115, p. xviii.

That a woman shall not lose her original nationality if she does not acquire that of her husband under the law of his country.

In consequence, the British Government has sent a circular to the Dominions enclosing this last proposal together with that of the Imperial Conference for their consideration and has further stated in the House of Commons that, should the Dominions agree, legislation would be introduced to give effect thereto. There seems little doubt that this agreement will be reached. A further and much more important step was taken on February 18 of this year, when the House of Commons, without a division, passed the following resolution [1]:

That, in the opinion of this House, a British woman shall not lose or be deemed to lose her nationality by the mere act of marriage with an alien, but that it shall be open to her to make a declaration of alienage.

The debate was remarkable in that no single speaker opposed giving to British women this choice. An amendment putting on the woman the onus of declaring she would remain British was moved but ultimately withdrawn. The Government representative stated in the course of debate, that they would not oppose the resolution and that, if the withdrawn amendment were agreed to by the Dominions, they would introduce legislation on these lines; but he was silent as to the line they would take if the resolution itself were approved. This resolution has also been circulated to the Dominions. A similar resolution is shortly to be moved in both Houses of the Australian, and, it is hoped, in the other Dominion Parliaments. The above statement of the Government is significant in that it makes clear that they are prepared, in the conditions quoted, to promote legislation which would make it possible for a British woman to retain her nationality on marriage with an alien —a very great advance.

Other Exceptions to the "General Rule." [2]—Since the legislators of this country, up to 1914, sought to make our law conform to the general rule that a woman should follow the nationality of her husband, and since a desire for legal symmetry on the matter tends to dominate the outlook of certain lawyers, it may be useful to inquire whether the rule is really so very general as it is assumed to be. The rule that a foreign woman acquires the nationality of her husband on marriage does not apply in Russia, the United States,

[1] Parliamentary Debates, Feb. 18, 1925, p. 1188.

[2] See also Foreign Office Memorandum, in 1923, Cmd. 115, pp. 168 and 171.

the Argentine, Chile, or Uruguay, and it is uncertain whether it applies in Brazil. That is to say, in two of the largest countries of the world and in three, or possibly four, important countries in South America. It is to be noted that the United States is the foreign country with which we have more dealings than any other, and that the total populations of these countries, all with a predominantly white population, amount to not far off 250,000,000. The other half of the rule, that a woman loses her nationality on marriage with a foreigner, has many more exceptions. The above mentioned five countries are outside it, as is also Colombia. A woman of Equador or Dominica loses her nationality in such a case only if she so desires. A Belgian woman can within six months, an Esthonian within two weeks, of her marriage, declare that she retains her own nationality. Then there is the long and increasing list of countries where a woman does not lose her nationality on marrying a foreigner, unless by the laws of her husband's country she acquires his, including Belgium,[1] Bulgaria,[2] China,[3] France,[4] Italy,[5] Siam,[6] Monaco,[7] Portugal,[8] Switzerland, Mexico and Austria. Also, a Swedish woman married to a foreigner does not lose her nationality unless she takes up her domicile in her husband's country; a Danish or Norwegian, not unless she leaves her own. In France certain privileged women are allowed to retain their nationality. Besides the laws of the United Kingdom and of Germany[9] allow for a difference of nationality in marriage under provisions by which a woman may retain her own nationality should her husband change his during the marriage. Then, too, the United States Act and the Russian Soviet law both explicitly recognize the married woman's independent right to naturalization: the same would seem to be true of Esthonia,[10] and some legal authorities interpret the new Belgian law as making this possible; but this has not been tested, so far as the writer is aware.

[1] Nationality Law of May 15, 1922, Art. 12. See also 1923, Cmd. 1771 and 1923, Cmd. 1792.

[2] Art. 15 of Bulgarian Nationality Law.

[3] Law of Dec. 30, 1914 (s. 12). See also 1922 Cmd. 1771.

[4] Law of June 26, 1889, Art. 19.

[5] Law of June 13, 1912, Art. 10. See also 1922, Cmd. 1771, and 1913, Cmd. 6526.

[6] Nationality Law of April 10, 1913, Art. 4. See 1913, Cmd. 7057.

[7] Civil Code, Art. 19.

[8] Civil Code of 1867, Art. 22 (4). See 1893, Cmd. 7027.

[9] Law of July 22, 1913 (s. 16.) See 1914, Cmd. 7277.

[10] *State Gazette*, November 6, 1922, No. 136.

And even under the existing law it is not always the nationality of the wife which is affected by that of her spouse. A foreign man who possesses real property in Brazil,[1] and is married to a Brazilian woman, so long as he resides in Brazil, is treated as a Brazilian, unless he formally objects. In Japan, too, a foreigner who marries a Japanese woman who is the head of a house becomes Japanese.[2] Other countries give special facilities to the husbands of their nationals to naturalize. The foreign husband of a Frenchwoman has the preliminary term of residence reduced from three years to one.[3] For Belgian [4] full naturalization, a Belgian woman's husband has this term reduced from ten years to five. Portugal,[5] in such a case, waives the condition of three years' residence in Portugal. Panama reduces the term of residence to two years.

It may be of interest to mention how the stateless wife of an Argentinian is enabled to secure a passport. The foreign wife of an Argentinian, if she is domiciled in the Argentine, may receive a passport from the Argentinian Consular authorities, and be registered at the Argentine Consulates, but with the mention that she is not an Argentinian. Such machinery would, of course, not be necessary did the wife of the Argentinian happen to be an Uruguayan, an American, or a Frenchwoman, or did she belong to any of the other countries which allow a woman national to retain her nationality, when she does not acquire her husband's, because, in such a case, she would have her own diplomatic authorities to protect her, and could have a passport in her own right.

International Action.—It is obvious that this matter cannot be satisfactorily dealt with without some agreement between different nations in order to prevent the hardships which arise from statelessness or from conflicts of law. The International Woman Suffrage Alliance is, therefore, advocating that an International Conference of Representatives of Governments should be called to consider the question. And they have issued a Provisional Draft International Convention,[6] as a basis of criticism which might be considered at

[1] Constitution of February 26, 1891, Tit. IV, Sec. 1 Art 69 (5). See 1892, Cmd. 6589.

[2] Law of Nationality, 1899, Art. 5 (2).

[3] Art. 17.

[4] Nationality Law of May 15, 1922. See also 1922, Cmd. 1771, or 1923 Cmd. 1792.

[5] Decree of Diario do Governo, of December 3, 1910. See 1893, Cmd. 7027, and 1912, Cmd. 6073.

[6] Printed in English and French in *Report of the International Law Association*, 1924, p. 45.

such a conference. They have been fortunate in that the Swedish Government has informed them that they will bring this proposal and the Draft Convention before the recently established League of Nations Commission on the Codification of International Law, and these will, no doubt, be considered by the small Committee on nationality in general which that Commission has appointed. The Draft Convention lays down, as General Principles :

(*a*) That the nationality of a woman shall not be changed by reason only of (1) marriage, or (2) a change during marriage in the nationality of the husband.

(*b*) That the right of a married woman to retain her nationality, or to change it, shall not be denied or abridged because she is a married woman.

(*c*) That the nationality of a married woman shall not be changed without her consent, except under conditions which would cause a change in the nationality of a man without his consent.

It also makes practical proposals for the application of these principles in legislation. It is suggested that a married woman should be naturalized on the same terms as a man, but that she should also be given special facilities for acquiring the nationality of her husband (note : such a provision exists in the new American law) ; and that special facilities might be given to a man to acquire the nationality of his wife (note : such provisions exist in French law). As regards the loss of nationality, the Convention proposes that, in addition to losing it under the same conditions as a man, a married woman should lose it if she both acquires her husband's nationality and also makes a declaration of alienage. To provide for the period of transition or for marriages between parties one of whom belongs to a country which had, and the other to one which had not, adopted the Convention, it is proposed that a stateless married woman should be entitled to a passport and protection from her husband's State (note : such a provision, in a partial form, exists in the Argentine). The most difficult case to deal with is that where one or both parties to a marriage belong to a country where the rights and duties of spouses in their personal relations and as regards their property are dependent on nationality and not on domicile. The draft proposal is that in future marriages these should be made dependent on the nationality of either the husband or the wife, as both should agree at the time of the marriage. It is further proposed that legislation should be retrospective where the woman concerned makes a declaration to that effect.

The International Law Association has also dealt with the question from the point of view, not of improving the law, but of obviating conflicts of law. At their 1924 meeting in Stockholm they recommended the adoption of the following rules [1] in the legislation of different States :

(*a*) A woman national of a conforming State shall not, by reason of her marriage with a national of a non-conforming State, lose her original nationality unless or until, by reason of such marriage, she becomes a national of such other State, either automatically or by naturalization.

(*b*) A woman national of a conforming State marrying a national of another conforming State shall acquire her husband's nationality; unless she does, under the law of the State to which she belonged before marriage, retain the nationality of such State, or unless she makes a formal declaration (to be recorded in the register of marriages), to the effect that she wishes to retain her former nationality.

But they have not declared their policy in the case of the woman national of a non-conforming State who marries the national of a conforming State.

It is evident that the general trend of legislation is in the direction of a further departure from the general rules which at the beginning of the century were almost universal in Europe. Besides the countries where they have never been in force, and those where they have recently ceased to be applicable, it is to be noted that a French Government has proposed a measure giving to Frenchwomen the right to choose their nationality on marriage with an alien, and that the British Government has stated itself willing, subject to the agreement of the Dominions, to do as much for British women. Any international arrangements will, therefore, have to be adapted, not to the old, but to the new order.

[1] *International Law Association, Stockholm Report,* 1925.

SUITS BETWEEN STATES WITHIN THE BRITISH EMPIRE.

[*Contributed by* Sir William Harrison Moore, K.B.E., C.M.G., LL.D.]

I

In *The Harvard Law Review*, vol. 34, p. 837, an article on " Sovereign Colonies," by Mr. Thomas Baty, raises the question, " Can one British Colony sue another ? " In a passage which is cited with approval by one of the justices of the High Court of Australia (Higgins J. in *The Commonwealth* v. *N.S.W.* [1923] 32 C.L.R., at p. 218), he reminds us that the colonies are not sovereign or *mi-souverain*, or corporations, and that the government of a colony is simply the King acting by a particular set of agents. " The suit of one colony by another colony would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by the Board of Agriculture because men who might be soldiers were kept to work at the harvest."

The learned author considers some of the difficulties of " Province " and " Dominion " rights in Canada under the British North America Act 1867 and Canadian legislation. Even where, as in the Constitution of the Commonwealth of Australia, " States " have been created by statute with liberty to sue each other (and may sue or be sued by the Commonwealth), nobody has apparently thought it desirable to ascertain what their rights are to be.

Now, it may be useful to bear in mind the observation of Farwell J. in the Taff Vale Case ([1901] A.C. at p. 429), that while a corporation or individual may be the only entity known to the common law who may sue and be sued, it is competent to the Legislature to give to an association which is neither the one nor the other a capacity for rights and for action and for sustaining the liabilities arising out of the one or the other. Also, it will not be denied that though the development of the British Constitution may have been begun in the King's kitchen, it did not stop there. In the British Constitution the rule of law and self-government were

achieved largely by the attribution of legal significance to the organ—legislative, executive or judicial—by which the Crown may act (cf. *Mackay* v. *A.-G. for British Columbia* [1922] 1 A.C. 457, 461). In the British Commonwealth of Nations the self-government of the several parts consists in the fact that, though the act is the act of the King, the King acts through different agencies for different parts of his Dominions (" the basic principle of the law of the Empire is that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality "—per Isaacs J., *Commonwealth* v. *Colonial Combing, etc., Co.* [1922], 31 C.L.R. 421, 438; cf. *Theodore* v. *Duncan* [1919], A.C. 696, 706). We have to realize that within the shadow of the broad shield of the Crown there are conflicts of substance of such a nature as, at any rate, to be fit for judicial determination, and such that, in the absence of means for a judicial determination, the matters are left to an embarrassing conflict of opposing wills. Where these opposing wills are those of agents of the King representing distinct political communities, with divergent views and interests, the conflict is not only real but dangerous, as we are beginning to find in the field of international relations and as the case of the Irish Boundary Commission shows. No doubt loose thought and ambiguous conceptions pervade modern constitutional theory, as Mr. Baty justly points out. But we do not escape our difficulties by ignoring the existence of divergent interests, or interring them in a legal doctrine too simple and elementary for the complex facts of to-day. At any rate, where Parliament has recognized communities as right and duty bearing entities, as in the Canadian and Australian Constitutions, it would seem that the doctrine of the Crown as the universal bearer of power and right must adapt itself to the condition created by the statute. Following the passage cited above from the *Commonwealth* v. *Colonial Combing, etc., Co., supra,* Isaacs J. goes on to call attention to the capacity of the common law to adapt its principles to the changing circumstances of the life of the community no less than to that of the individuals comprising it, and adds :

> It is the duty of the Judiciary to recognize the development of the nation and to apply established principles to the new positions which the nation, in its progress, from time to time assumes. The judicial organ would otherwise separate itself from the organic life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter (p. 439).

Whether we are to find the way through a conception of separate juristic personality corresponding with the several parts played by the Crown (*Municipal Council of Sydney* v. *Commonwealth of Australia* [1904] 1 C.L.R. at p. 231), or through the notion of representation by the Crown of different aggregations of persons (*Williams* v. *A.-G. for N.S.W.* [1913] 16 C.L.R. at p. 431), is rather a question of the mode of adaptation, and probably we shall finally adopt whichever of them appears more consonant with the theory of our common (including our constitutional) law. It would be a serious reflection on our legal capacity if we allowed the rights of distinct communities to go unrecognized and unprotected for lack merely of competent representation.

Apart from statute or from federal institutions, altogether, the unity of the Crown has not been allowed to stand in the way of adjudication where the Crown represents distinct substantive rights. The rights of the Crown as a proprietor may conflict with public rights of user represented by the Crown (*A.-G.* v. *Earl of Lonsdale* [1868] L.R. 7 Eq. 377, 389), or the fiscal rights of the Crown may conflict with the rights of a charity of which the Crown is the lawful guardian and representative (cf. *A.-G.* v. *Dean and Canons of Windsor* [1860] 8 H.L.C. 369, 401, and Halsbury, *Laws of England*, vol. viii, p. 327), or seignorial rights may conflict with national rights (*A.-G. for Jersey* v. *Solicitor-General for Jersey*, [1893], A.C. 326). In *Williams* v. *A.-G. for N.S.W.* [1913] 16 C.L.R. 404 [1915] A.C. 573 (a case which presents the Crown in not two, but three capacities), the distinctness of the rights represented by the Crown in its Imperial capacity and in its capacity as constitutional head of the Government of N.S.W., was recognized both in the High Court of Australia and in the Privy Council in the decision that proceedings by the A.-G. for N.S.W. in the Supreme Court of N.S.W. in vindication of property vested in the King in right of the United Kingdom were improperly constituted, while in the High Court of Australia it was affirmed that the proceedings would not have been exceptionable on any notion that the Crown, as representing one set of persons, may not sue the Crown, as representing another set of persons. (Cf. Barton A.C.J. at p. 414, and Isaacs J. at p. 430, with Higgins J. at pp. 465–6.) Finally, we are familiar in another jurisdiction with conflicts between the rights of the King *jure coronæ* and the rights of the King in his office of Admiralty. (The *Maria Françoise* [1806] 6 C. Rob. 282, the *Abonema* [1919], P. 41, the *Derfflinger* [1919], P. 264.)

It is thus clear that, when a right is vested in the Crown as

representing one sort of public interest, so that it is the Crown which represents that interest in any legal proceedings against any opposing claim of right in a subject, there is not necessarily a merger or extinction of legal right where the opposing claim, instead of being in a subject, is in the Crown itself, as representing some other of the numerous interests of which it is the guardian. There may be difficulties of procedure ; but, given a tribunal with jurisdiction and provision for competent representation of the opposing interests, there is no difficulty as to the legal right under a unitary government and a single system of law. Where the Crown represents different communities three classes of difficulty may present themselves—first, whether the relation is a legal relation at all, or merely a political arrangement ; secondly, as to the system of law which governs the relation ; and, thirdly, as to the tribunal which has jurisdiction. An illustration of the first may be found in *John Cooke & Co.* v. *The Commonwealth* [1922] 31 C.L.R. 394, where it was held that " the arrangement between the Imperial Government and the Commonwealth Government to acquire the wool clips (of Australia during the war), was one of a political nature not cognizable by courts of law, creating no legal rights or duties, and depending entirely for its performance upon the constitutional relationship between these Governments and their good faith towards each other." A doubtful case might be the Nauru Island Agreement between the Governments of Great Britain, Australia and New Zealand, confirmed by Act of Parliament (10 & 11 Geo. V c. 27), under which, *inter alia*, the contributions of each Government to the compensation payable to the expropriated Pacific Phosphate Co., are fixed, and the proportions of the three Governments in the phosphates produced in the island are allotted. Here are distinct *personæ designatæ*—certainly not interchangeable instruments of the King, as the report of the Judicial Committee on the Irish Boundary Commission illustrates (*The Times*, August 2, 1924) ; all the elements of contract are present and the matter of agreement is commercial or economic and not political or governmental. Assuming the submission of a dispute under the agreement to the Judicial Committee of the Privy Council, we cannot suppose that either bench or bar would feel any embarrassment or regard the matter as one presenting an unfamiliar class of question. No doubt the forms of procedure in the Petition of Right, wherein the claimant fills the rôle of suppliant, do not adapt themselves to suits by one Government against another, and a reference by the Crown to the Privy Council would be the obvious

mode of dealing with a dispute. But, since the decision in *Dyson* v. *A.-G.* [1911] 1 K.B. 410 has revealed a different mode of proceeding, it would be worthy of consideration whether a declaration might not be made in the Courts of one of the countries concerned against the Attorney-General of that country, at the suit of the Attorney-General of one of the other parties to the agreement. (In one English case, at any rate, the name of the Attorney-General for a colony stands on the record, *Attorney-General for Victoria* v. *Bullivant* [1901] A.C. 196.)

It has no doubt been held in England that the Attorney-General for the Duchy of Lancaster cannot institute proceedings outside the Courts of the Duchy on behalf of the Crown in right of the Duchy (*A.-G. for Duchy of Lancaster* v. *Duke of Devonshire* [1884] 14 Q.B.D. 195); but there the Attorney-General for England is held to be the competent representative of the Crown.[1] When, in *Williams* v. *A.-G. for N.S.W.* [1915] A.C. 573, the Privy Council held that the right which was the subject of the action, being a right of the King in his Imperial capacity, could not be represented by the Attorney-General for N.S.W. in the Supreme Court of N.S.W., they can hardly have meant to suggest that such a right could not be competently vindicated by anyone whomsoever; they do in fact treat the defect in the action as one of form, though of essential form.

The question whether there is a legal right involves reference to some system of law binding the parts. In the case of contests between Governments in the British Empire, that law may be supplied by an Act of the Imperial Parliament, and the question may be one of interpretation. In other cases, the governing law might be equally clearly indicated by the principles of Private International Law invoked, according to British theory, as part of the law of the *forum* applicable to the subject-matter. But there are many matters which may present novel problems of the system of law, not to be solved by falling back on an Imperial Act or by an application of established doctrines of Private International Law. If neither Imperial legislation nor the territorial law of either of the disputing parties can make an exclusive claim to govern the subject, is the matter, by that fact, political and non-justiciable, neither "positive morality," nor "positive law"? In the present article,

[1] It may still be open to question whether the Attorney-General for the Duchy, if his patent expressly covered appearance in the High Court, would not be a competent and proper person to represent the Duchy rights in any matter where those rights were in conflict with those of the King *jure coronæ*.

the writer begins an examination of the subject of suits between Commonwealth and State and between State and State in Australia.

II. The Commonwealth of Australia.

The Constitution (63 & 64 Vict. c. 12) confers original jurisdiction on the High Court of Australia in all matters, *inter alia*, (1) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (s. 75, iii); or (2) between States (s. 75, iv). By s. 78, the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power, and by the Judiciary Act, 1903–1907, persons or States making claims in contract or tort against the Commonwealth, and States making claims against other States may proceed in the High Court (Part IX). Suits on behalf of Commonwealth or State may be brought by their Attorney-General, respectively (ss. 61, 62).

Here then is the recognition of Commonwealth and States as parties who may be at issue, and here is a tribunal which has jurisdiction over all, compulsory and not optional. Where the parties and the tribunal are designated, the remaining factors are the justiciable matter between them and the system from which the governing law is to be drawn. As to the first, the Constitution merely declares that "in all matters . . . the High Court shall have original jurisdiction."

In form, therefore, the ascertainment of the scope and limits of justiciable issues between these parties presents itself as a question of judicial interpretation of the term "matters." In substance, the Court has to work out a plan consistent with its own nature as a judicial and not a legislative or administrative organ, a Court and not an arbitrator or conciliator, a tribunal whose justice is primarily according to law and not according to discretion.

Now where, as in the case of Commonwealth and State, you have distinct political authorities operating over the same territory with their respective powers defined by a law paramount over both, there will be conflicts as to the limits of governmental power and these will be questions of law. In addition to these conflicts of power, there will be the same possibilities of conflict in matters of legal right as are to be found between other persons owning and occupying property, using public facilities, and so on, the occasions of conflict being increased by the pervading character of the opera-

tions of both, particularly in the country where government undertakes so much of social service as in Australia.

The Constitution has provided for the relation of their constitutional powers in various ways, *e.g.* some powers are declared to belong exclusively to the Commonwealth, and conflicts of legislation are met by the provision of s. 109 that the Commonwealth law is to prevail over the State. It would be entirely within the scope of the purposes of a Constitution to provide for the protection of the interests of each against attack by the other where those interests are of a kind which are protected as between subject and subject. To leave these interests unprotected, or to leave their protection to the sole will of either Government, or to their agreement, would be to leave a legal incompleteness which might have mischievous consequences. When, therefore, a Court is set up which has jurisdiction over these political entities, it is reasonable to conclude that this mischief was provided against, and that either might invoke that jurisdiction for the protection of its interests at the least where the relations between subject and subject would be similarly protected by law in appropriate tribunals. In this view, the Commonwealth could maintain an action of tort against Victoria, whose State law makes no provision for suits against the State in tort, as well as against N.S.W., whose law does make such provision.

If this view is correct, it involves the important result that although the King is the *persona* of both Commonwealth and State, whose prerogatives each of them carries into litigation, one test of whether the Commonwealth is liable to the State or the State to the Commonwealth in given facts is to be found not in whether the subject would have a remedy against the Crown but rather in whether one subject would have a remedy against another. In *Commonwealth of Australia* v. *N.S.W.* [1923] 32 C.L.R. 200, the action was brought by the Commonwealth for damages for a collision occurring in Sydney Harbour between boats belonging to the Commonwealth and N.S.W., respectively. At common law, of course, the Crown is not liable in tort to the subject; the Commonwealth Constitution, as already pointed out, in terms does no more than give jurisdiction over "matters" between the parties, and the majority of the High Court (Higgins J. dissenting on this point) held that neither could the Commonwealth Parliament acting under s. 78 of the Constitution confer a right on the Commonwealth to sue a State in tort if it were not otherwise liable, nor had the Judiciary Act in its proper interpretation purported to confer such a right. Nevertheless,

the Court held that the State was liable: the word "matters" embraced all claims referable to a legal standard of right, including torts. It should be observed that the law of N.S.W. gives a remedy in tort against the Government (*Farnell* v. *Bowman* [1887] 12 A.C. 643), and as it makes no exception against the Commonwealth, it would appear that the Commonwealth had a right of suit under the N.S.W. statute. But the Court in no way rests its decision on any right given by N.S.W. law, which if accepted might of course involve that N.S.W. could withdraw the right, and that if the delinquent ship had been the property of the Government of Victoria, and not of the Government of N.S.W., the Commonwealth would have been without remedy since the Victorian law, like that of England, does not provide for suits against the Crown in Court.[1]

The decision of the High Court that the grant of jurisdiction in s. 75 of the Constitution confers also the substantive right and consequent liability, appears to the writer to be sound as applicable to suits between Commonwealth and State and (perhaps) between State and State, for the reasons already explained. But if the same effect is to be attributed in other cases under s. 75—as where the section gives jurisdiction in matters between a State and a resident of another State, or between residents of different States—it leads to a singular result. The High Court has not jurisdiction in matters between a State and residents of that State. If, then, a collision took place in Victorian waters between a vessel belonging to the Victorian Government and a vessel privately owned, the Victorian Government

[1] The High Court does rely on *Farnell* v. *Bowman*, but only in the way that a decision on one statute may throw light on the interpretation of another on a similar subject. The High Court was impressed with the observations of the Privy Council in *Farnell* v. *Bowman* [1887] 12 A.C. 643, as to the requirements of justice that, in these days of extensive activities of governments, the Crown should be liable in tort as well as in contract, and it may be that in view of twentieth-century conditions it is proper to reject a historico-legal interpretation in the case of a new jurisdiction and to prefer one more consonant with reasons of justice and convenience *in pari materia* recognized by the Privy Council. But, with great respect to the learned justices of the High Court, these were not the "broad main reasons" for the Privy Council decision. Those are to be found in the history of the subject applied to the emphatic terms of the Act. There was in that case a legislative history in the course of which Parliament having in one Act specifically hinted the remedy to cases in which the petition of right was available, had in another Act omitted that proviso, and had in prescribing remedies against the Crown also explicably recognized that the petition of right was of "limited operation and insufficient to meet all such cases," *i.e.* where disputes had arisen or might arise between the subject and the Government. Having elicited these facts from a detailed examination of the history of the subject, the Privy Council could find no reason for restricting the ample words used in the Act under consideration ("any just claim or demand whatever") in such a way as to exclude claims for tort.

would be liable if the private owner were a resident of another State, because s. 75 conferring jurisdiction on the High Court is to be deemed to establish a liability of the State in tort; but the Government would not be liable if the private owner were a resident of Victoria, because that matter is wholly governed by Victorian law and the law of Victoria does not make the Government liable in tort.

It being clear that matters of right litigable between subject and subject are litigable between Commonwealth and State, or between State and State, it is of course necessary to find the right. Assuming for the present that the system of law governing the question has been ascertained, that law may not have lodged the right claimed in the plaintiff State. Here, again, the unity of the Crown has been thought to present difficulties. In *South Australia* v. *Victoria*, 12 C.L.R. 667, [1914] A.C., 283 where the substantive matter in issue was boundary between two States, the suit was treated as one of conflicting claims to title and possession of land, in which the plaintiff asserting title in itself claimed possession from the other State as a trespasser. But Higgins J., dissenting from his colleagues in this respect considered that the plaintiff State had not established that the title was in it. Whether the land lay within the limits of South Australia or Victoria, and whichever Legislature had the power of controlling the revenue from it or regulating its tenure the title and possession lay in the Crown and in neither of the States (see p. 744). It will be observed that this view does not deny that a State may sue another, or have rights—even rights in land—against another. It might even concede that where, as in the British North America Act, things are spoken of as " belonging to " Canada or a Province, the King, in right of Canada, might sue the King in right of a Province. What it does is to deny that the Imperial Acts creating the several States, allotting their boundaries and conferring upon their Legislatures the power to dispose of these lands and the revenue arising from them, do in any way dispose of the title or alter the possession, and it asserts, therefore, that no right of " South Australia," or of " the King in right of South Australia " to the title or possession exists: the title and the possession lie where they lay before the enactment of the Constitutions, in " the King, not as part of the South Australian Government, but as sovereign of all the Dominions " (p. 744), *cf.* [1923] 33 C.L.R. 1, 62, and contrast the observation of Isaacs J. in *Williams* v. *A.-G. for N.S.W.* [1913] 16 C.L.R. 404, 442: " It is a mere truism to say that the title of the

King to the lands of the Colony (N.S.W.) was in right of his sovereignty of the Colony, in other words, in right of the Colony " ; see also p. 455 : " The fact that carries importance is that the King always owned the colonial land *in right of his Colony*. Therefore, while it is true that the Constitution Acts transferred the lands to the Colony as a matter of governmental function, and not as a matter of title (p. 456), the transfer of title was unnecessary, for the distinction had been there throughout." Indeed, if the title and possession are not in the Crown in right of the Colony (now State), it is not easy to see—consistently with the decision in *Williams* v. *A.-G. for N.S.W.* (*ante*), how the Attorney-General for the Colony could represent the King in suits against subjects for the protection of Crown rights, a matter settled in Victoria as long ago as 1863 (*A.-G.* v. *Gee* 1 *W. & W.* (Equity) 122. See also *A.-G.* v. *Belson* [1867] 4 W. W. & a'B. (Equity) 57.

If matters litigable between subject and subject are litigable between Commonwealth and State or State and State, is that the limit of justiciable matters ? Judicial language has suggested that it is. Thus, in *South Australia* v. *Victoria* [1911] 12 C.L.R. at p. 675, Griffith C.J. says : " In my opinion, a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined on principles of law " (*cf.* Higgins J. at p. 742).

In the first place, the decision in that case establishes that if such a right is set up, the jurisdiction of the Court is not displaced, nor is the matter less justiciable, by the fact that consequences as to political power and authority will follow the determination of the right, the displacement of the authority of one Government and the establishment of that of another over disputed territory (*cf.* 12 C.L.R. at p. 707, O'Connor J., and see *Virginia* v. *West Virginia*, 11 Wallace 39). There is no analogy to " act of State," where a matter of legal right depending in the Courts of one sovereign may merge its legal character in the political question between Governments. The Court here is not a foreign jurisdiction to one Government as being the domestic tribunal of another ; it is a tribunal to which each alike is subject.

In the second place, the judicial language used must not be understood to mean that these political entities may not pursue rights merely because they arise out of some special title peculiar to the parties as Governments. There are, in fact, numerous rights

conferred and duties imposed by the Constitution upon each of them (see, particularly, chapters iv and v and Cf. *Commonwealth* v. *N.S.W.* 32 C.L.R. 200, 213, per Isaacs J.). One of the earliest cases before the High Court presented the question whether the claimant State (Tasmania) was entitled under the Constitution as against the State of Victoria and the Commonwealth to certain duties of customs and excise collected in Tasmania between certain dates (*State of Tasmania* v. *Commonwealth* [1904] 1 C.L.R. 329). *N.S.W.* v. *Commonwealth* [1908] 6 C.L.R. 214 and *N.S.W.* v. *Commonwealth* [1908] 7 C.L.R. 179 are cases of the same kind—the State is claiming money alleged to be due to it under the apportionment of certain revenues and liabilities in various sections of the Constitution.

The subject-matter in all these cases was the respective rights of the Governments in public revenue, and therefore of a nature peculiar to Governments. But the thing claimed was a sum of money, and the foundation of the claim was a statutory right, a state of things familiar enough in ordinary private relations.

In *Commonwealth* v. *N.S.W.* [1906] 3 C.L.R. 807 and [1918] 25 C.L.R. 325, the Commonwealth sued to recover money paid under protest to the State for certain services. The fact that the claim was based on a constitutional privilege of the Commonwealth belonging to it under the federal relation was, of course, no bar to the proceeding.

In the *Commonwealth* v. *N.S.W.* [1923] 33 C.L.R. 1 the question was whether on the passing of land or property from a State to the Commonwealth, whether by direct transfer in the Constitution itself, or by compulsory acquisition or otherwise, royal metals were held by the Crown in right of the Commonwealth or continued to be held in right of the State. A claim as to the respective rights of Commonwealth and State in land is none the less justiciable in that the claim is asserted and resisted on rights peculiar to the Crown, and the question is to what extent rights admittedly in the Crown inhere in it as representing the one community or the other.

But in addition to the rights of the Crown under common titles, and these rights which, though of a similar nature to the rights of subjects, are enjoyed under some special title, the Crown has certain distinctive rights belonging to it in its governmental capacity, as guardian and protector of collective interests of the community. Can these be asserted not merely against persons assuming to act on behalf of another Government but against that other Government

itself? Before answering this question, it is well to turn to some notable developments in common law and equity outside federal institutions altogether.

The rule of law in the English system makes matters of power and authority familiar matters of judicial cognizance; if a man's right is invaded, the power relied on may be required to justify itself in law in a civil action for damages or in a criminal prosecution. But it is not only in such remedial or punitive proceedings that power is amenable to the Courts. Modern developments of equity, extensions of injunction (cf. *The King* v. *Macfarlane* [1923] 3 C.L.R. 518), the use of the declaration (cf. *Dyson* v. *Attorney-General* [1911] 1 K.B. 410), suits by and against the Attorney-General (cf. *Colonial Sugar Refining Co.* v. *A.-G. for the Commonwealth* [1914] A.C. 237), and of the prerogative writs at common law (cf. *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 192), bring the assumption of power and authority before the Courts in a peculiarly significant way—judicial control is directed to the act itself, preventing it or declaring that the threatened act is unlawful, or annulling it.

A hundred years ago the Court of Chancery hesitated about enjoining the unlawful acts of public authorities, *inter alia*, because such interference looked like an intrusion into the sphere of criminal law. The several steps forward and the influences which induced them, the analogies and the reasons resorted to, the line of cases, from *A. G.* v. *Brown* [1818] 1 Swans. 265 and *A.-G.* v. *Mayor, etc., of Dublin* [1827] 1 Bligh 312, to *A.-G.* v. *Shrewsbury Bridge Co.* [1882] 21 Ch. Div. 752, and *London County Council* v. *A.-G.* [1902] A.C. 165, are not the least interesting chapter in our legal history, and illustrate the capacity of the law to adapt itself to new conditions. In the result, a control in equity at the suit of the Crown establishes itself alongside the control by the common law jurisdiction, and a more direct control since the injunction is preventive and the common law (save by the prerogative writs) operates by way of compensation or punishment merely. Here, as elsewhere, privileges of the Crown are turned to the profit of the subject, and the Crown, as *parens patriæ*, representing the community in its social interests, comes into Court through the Attorney-General to restrain the excess of power or illegal exercise of power, though no injury to particular persons is shown (*A.-G.* v. *Shrewsbury Bridge Co.* [1882] 1 Ch. Div. 752; *A.-G.* v. *London & N.W. Rly. Co.* [1900] 1 Q.B. 78; *A.-G. for N.S.W.* v. *Brewery Employees Union of N.S.W.* [1908] 6 C.L.R. 469).

While, on the one hand, the Crown may thus invoke the Courts to control the unauthorized assumption of powers, on the other the right of the subject to proceed against the Crown in respect of the unauthorized acts of public departments or officers has assumed a new character since the decision in *Dyson* v. *A.-G.* [1911] 1 K.B. 494. Where a public department is threatening the right of a subject or is proceeding to the exercise of a power which if valid would impose upon him obligations, the subject may proceed against the Attorney-General, and claim a declaration of no-power. Cf. in *Australia Colonial Sugar Refining Co.* v. *A.-G. for Commonwealth* [1912] 15 C.L.R. 182, [1914], A.C. 23, where a declaration was sought that a Royal Commission had no power to compel answers to its questions; and *Taylor* v. *A.-G. for Queensland* [1917] 23 C.L.R. 457, where plaintiff sought a declaration that two Acts of Parliament were invalid and that an impending referendum to the electors of Queensland was prohibited and unlawful. In the first case, the Act was declared invalid; in the second, the Acts were sustained, but no objection was based either on want of jurisdiction or want of equity, if plaintiff were right in his submission that the Acts were invalid.

Finally, as already pointed out, we have the recognition for various purposes of the several distinct capacities of the Crown.

The principles thus recognized in a unitary society have been adapted to the capacities of the Crown as representing distinct territorial communities in a federal system, where there is a Court with jurisdiction over the Crown in both those capacities. In *A.-G. for N.S.W.* v. *Brewery Employees Union of N.S.W. and the Registrar of Trade Marks for the Commonwealth* [1908] 6 C.L.R. 469, the position was that under the Trade Marks Act of the Commonwealth Parliament the Registrar of Trade Marks had established a register of "workers' trade marks," and the defendant union had registered therein a union mark or label. The plaintiff sought a declaration that the provisions of the Act relating to workers' trade marks were unauthorized by the Constitution, and that the registration was consequently invalid, an order to the Registrar cancelling the registration, and an injunction restraining the Registrar from keeping the Register. A Court of four justices held that the suit was well constituted. Higgins J. dissented, upon the grounds, amongst others, that there was no injury upon which any suit could be maintained: the mere passing of an Act by one Parliament on a subject as to which another Parliament had exclusive power and the making of an entry in pursuance of that Act, did not

constitute a matter for judicial cognizance at the suit of the Government that had the power (pp. 598–9) ; and that the only " public " that could be recognized in relation to acts of the Commonwealth was the public of the Commonwealth, and that, therefore, even if there were a cause of action, the only proper plaintiff was the Attorney-General of the Commonwealth, and not the Attorney-General of a State [1] (p. 597).

O'Connor J., who concurred in the decision, considered that it was an extension of principle, but an essential in the working act of the federal system.

Isaacs J. is more explicit in meeting the objections taken by Higgins J. :

> If under the assumed powers of a federal statute—in fact invalid —some usurpation of State administration or judicial authority is attempted in the State, it would be a trespass on State territory, and the A.-G. for the State, as representing the King, could apply to restrain it. His rights in this respect could not be lessened merely because a similar usurpation was asserted over the territory of other States. And if there is a legislative usurpation, if an Act of the Commonwealth Parliament, unauthorized by the federal Constitution, occupies part of the legislative field exclusively reserved for the State of N.S.W., and by its commands, operative in all parts of Australia, prescribes to the citizens of that State the rules of conduct they must follow under penalty, I am of opinion that the case is parallel with that of administrative and judicial intrusion upon State territory. The Attorney-General for a State in that case does not depend upon the infringement of rights possessed by individuals under a federal statute, but protects on behalf of the Crown those rights and functions with which the King, guided solely by his State representatives and advisers, is invested in respect of the State (pp. 557–8).

The view of Isaacs J. is of peculiar interest in its relation to the federal system. The suit of the State Attorney-General might, it would seem, have been supported by the consideration that if it were the law before federation that there was a public interest on which the A.-G. for N.S.W. might sue for any unauthorized

[1] The learned justice (who speaks from a long experience in equity) has maintained his view that suits or declarations against the validity of an Act, in the absence of some act done thereunder invading plaintiff's rights, present no justiciable matter (*Colonial Sugar Refining Co.* v. *A.-G. for Commonwealth* [1912] 15 C.L.R. 182, *Commonwealth* v. *Queensland* [1920] 29 C.L.R. 1, *The King* v. *Macfarlane and O'Flanagan* v. *Macfarlane* [1923] 32 C.L.R. 518, *W. & A. McArthur* v. *Queensland* [1920] 28 C.L.R. 530, 560), and that neither State nor Commonwealth has any *locus standi* to challenge the legislation of the other merely on the ground that that legislation is an invasion of the plaintiff's sphere.

assumption of power over the rights of subjects generally, there was nothing in the Constitution to take away this right of the Crown as *parens patriæ* to seek the injunction of unauthorized power ; that the powers of the Commonwealth and therefore every authority it can convey being limited by the Constitution, whatever is done in the name of the Commonwealth beyond those powers is void or illegal and can confer no protection against a competent plaintiff. But this is not the view presented by Isaacs J. The intervention of the Crown, it would appear, is sustained less in the character of *parens patriæ* protecting the subjects against unauthorized attempts to control them and their affairs, than in defence of powers vested by the Constitution in the Crown in right of the State and exercisable by the Crown through the several State authorities, judicial, administrative and legislative. If administrative or judicial authorities are set up by the Commonwealth who are proceeding to exercise powers which can under the Constitution be derived only from State law, the Crown can protect the powers with which it is invested in respect of the State. But it does not stop there. Even where no acts of Commonwealth administration are done, if the Commonwealth Statute is one which merely prescribes a course of conduct under penalty, the Attorney-General has a right to intervene in protection of the distribution of legislative power made by the Constitution. If it is the usurpation of legislative power which furnishes the cause of action, there is no need to wait until someone is threatened with punishment or proceedings are pending against him. The question arises, against whom would the A.-G.'s action be directed, whom would he make defendant ? In the case before the Court, one of the defendants was a Commonwealth administrative officer, who was, indeed, threatening no one with compulsion or liability, but was, at any rate, performing a function as an instrument of the Commonwealth under the Act. The other defendants were not officers, but by registration they had completed their title to certain rights created and protected by the Act ; they had voluntarily availed themselves of the Act. But there may be cases in which even this has not been done under an Act, and there is no one, therefore, who is sufficiently involved by his action in the operation of the Act to furnish grounds for making him a defendant. In such a case, if at this stage anyone can be sued at all by the Attorney-General of the State, it must surely be someone who represents the usurping authority, *i.e.* the Commonwealth.

We are here brought to the principle of *Dyson* v. *Attorney-General* [1911] 1 K.B. 494. Where the power is actually in exercise by one who is the agent of the Commonwealth, claiming rights or seeking to impose obligations or liabilities, the mandatory of the Commonwealth and not the mere donee of an alleged right, *Dyson* v. *A.-G.* comes to aid the attack both by designating a person who may be sued, and by exhibiting a remedy—the declaration—which adapts itself to the conflicts of governments in the legal arena. In *Colonial Sugar Refining Co.* v. *A.-G. for Commonwealth* [1912] 15 C.L.R. 182, the High Court was divided in opinion where the proceeding was one against the operations of a Royal Commission of Inquiry, claiming that its proposed activities were outside the scope of inquiry committed to it and that the Act of the Commonwealth Parliament constituting it was invalid. The Privy Council ([1914] A.C. 237) held that the suit was well constituted, and issued a declaration that the statute was *ultra vires*. In several cases, issue has been joined directly by the conflicting Governments on alleged unlawful assumptions of power, the suit proceeding either in the name of the Attorney-General or of the Commonwealth and States, e.g. *Commonwealth* v. *N.S.W.* [1915] 20 C.L.R. 54 (suit for declaration of invalidity of N.S.W. Wheat Acquisition Act) ; *A.-G. for Queensland* v. *A.-G. for Commonwealth* [1915] 20 C.L.R. 148 (suit for declaration of invalidity of part of Commonwealth Land Tax Act) ; *Commonwealth and A.-G. for Commonwealth* v. *Queensland* [1920] 29 C.L.R. 1 (suit for declaration of invalidity of sections of Queensland Income Tax Acts).

The fact that the King through the one set of authorities, executive, legislative and judicial, was exercising governmental power over territory alleged to be subject exclusively under the terms of an Imperial Act to the King acting through another set of authorities, executive, legislative and judicial, would on the principles just considered appear to establish jurisdiction and a justiciable matter in *South Australia* v. *Victoria* [1911] 12 C.L.R. 667 ; [1914] A.C. 283, apart altogether from the matter of possession and title on which that case was decided.

DAM DUPAT—ALTERUM TANTUM.

[*Contributed by* S. G. VESEY-FITZGERALD, ESQ., M.A. (OXON).]

" Usury Laws have always been failures. . . . A short-term Statute of Limitations . . . would be far more effective. It would pull the debtor up short before he had got hopelessly involved in the spider's web."—SIR MACKENZIE CHALMERS in *The Times*, Saturday, March 21, 1925.

USURY is one of the most abiding, as it is one of the most elusive, of all problems of mixed law and economics. The Roman patrician, the hereditary *sahukar* of an Indian village, the Irish gombeen man and the literary genius who implores us to trust ourselves with his money ; what have these in common ? They all charge high rates for high risks. But that is inevitable, and no law has ever succeeded in preventing it ; though it is easy enough, as English experience showed up to 1854, for such a law to throttle genuine banking enterprise. High interest rates are not in themselves bad ; and in the matter of dishonesty there is seldom much to pick between Shylock and his victims. But the root of the evil is that the former is usually a man of strong will trading with (and on) the weak-willed ; a man of brains battening on fools ; and in almost every case a better educated man taking advantage of the ignorant and half-educated.

In nothing is this more marked than in the accumulation of compound interest. Such accumulation is not necessarily oppressive ; a rigorous prohibition of it would be obviously unjust, and experience shows it to be futile. But to the vast majority of mankind the geometrical progression of compound interest is as great a mystery as Einstein's Theory of Relativity. Even highly educated Englishmen—men with University honours—have been known to suppose that 24 per cent. with yearly rests for a term of years would be exactly double 12 per cent. for the same period !

The ordinary Indian agriculturist is incapable of even signing his own name, and as often as not cannot count beyond twenty without the aid of pebbles. How can he be expected to realize the growth of his liabilities when he allows, as he usually does, the interest on a loan to go unpaid? Such a man may be a hard-headed business man within the limits of his education, but his education has not reached the stage of geometrical progression.

The first necessity of a satisfactory Law of Usury for India is that it shall impose an easily understood limitation beyond which unpaid interest cannot accumulate. If the moneylender chooses to let his money lie idle after that limitation is reached, he has nobody but himself to blame. The English common law principle, by which after the money has been lent all active duties are thrown on the debtor, must be *pro tanto* reversed, and some part of the duty of collecting his debt thrown on the creditor as the stronger party. We have the great authority of Sir Mackenzie Chalmers for the suggestion that such a change might not be altogether out of place in England also. Sir Mackenzie, however, merely suggests shortening the time. The rule here suggested has the advantage of elasticity; and behind it, as will be shown, is a weight of authority that no man can afford to despise.

I. **Hindu Law.**—The rule of *dam dupat* is stated by Manu in the following terms:

Manu VIII. 151 (Kulluka's gloss in italics). Interest on money received at once, *not month by month, or day by day as it ought*, must never be more than enough to double the debt, *that is more than the amount of the principal paid at the same time*; on grain, on fruit, on wool or hair, on beasts of burden, *lent to be paid in the same kind of equal value*, it must not be more than enough to make the debt quintuple.[1]

Whatever we may think of the antiquity of Manu, this rule, at any rate, has been an integral part of Hindu Law from before the great Hindu conquests of the Farther East, for it has been carried by Hindu influence into Burma, Siam, Sumatra and Java.[2]

[1] Sir William Jones's translation. In the province (Berar) where the present writer has had to administer the rule, it is usual to read three-fold instead of quintuple for grain debts. The origin of the higher limit for grain was, of course, its seasonal fluctuations in exchange value: it is borrowed at seed time and repaid at harvest. But the machinery of our courts and the fact that by English law damages must be calculated in money [see L.Q.R., vol. xli, p. 220, note by the present writer] have rendered this part of the rule obsolete.

[2] Wagaru (Burma), s. 3 (quoted from Forchhammer, who also gives references to other early Burmese lawbooks: the *Manu Ring*, the *Wannana* and the *Manu*

To the present day it has the enthusiastic support of all classes of the Hindu population, at least in those parts of the Mufassal where statute has not made English Law the sole criterion in cases of contract ; *i.e.* the Native States, the Presidency of Bombay and the leased province of Berar ; and, *pace* Dr. Sen, it still proves an effective check on the worst evil of usury. Those greatest of Hindu judges, Telang J.[1] and Ranade J.[2] have added the weight of their authority to its exposition. It is only among the English and Anglicized lawyers of the Presidency towns (where the rule is also in force) that it has met with hostility ; based, one may respectfully suggest, sometimes on misunderstanding and sometimes on a sense of inelegancy which is unavoidable so long as the rule is not universally applied.

James Mill in his *History of India*, while noting that a similar rule was introduced by the Pharaoh Bocchoris in ancient Egypt,[3] makes the strange criticism that the rule " would give effectual motives to the Hindu creditor to exact the regular payment of his interest with rigid severity,"—as if putting off a claim were necessarily the same thing as foregoing it. Couch, C.J., and a full Bench of the Bombay High Court,[4] refused to apply the rule against a mortgagee in possession on the ground that it was

Sara). " If a man has contracted a debt, and is unable to repay the same after a lapse of five or ten years from the date of contracting it, the creditor shall not be entitled to a monthly interest on his money, but to an amount of interest which is equal to the sum originally lent."

Laxana Ku-ni (Siam : quoted by T. Masao, D.C.L., in *J. Siam Soc.*, II. 4). " Where a person contracts a debt and pays interest for one, two or three months, but afterwards fails to do so ; and when the creditor presses him, he defers or evades payment, so that the creditor, having received neither capital nor interest for a long time, summons him before the judge, the interest which the debtor has paid from the first, second or third month is profit due to the creditor ; the creditor may also claim the amount of interest which remains unpaid, but if the debt be a long-standing one, let the interest not exceed the capital [lit. ' let it be paid to the face only '] according to law." (Dr. Masao adds that this law is still enforced in Siam.)

Customs of the Rejangs (Sumatra : Marsden's *Sumatra*, p. 224). " No more than double the principal can in any case be recovered at law. A person lending money and letting it lie over beyond two years (the local rate of interest being 50 per cent. per annum) loses the surplus.

Customs of the Passumah (Sumatra : *ibid.*, p. 231). " In all suits relating to debts on interest, how long soever they may have been outstanding, the creditor shall not be entitled to more interest than may amount to a sum equal to the capital."

In Java also Manu is venerated as a lawgiver, though apparently no longer in force *eo nomine*.

[1] *Ganesh Dharnidhar* v. *Keshavrav Kulgavkar*, I.L.R. 15 Bom. 625.

[2] *Dagdusa* v. *Ramchandra*, I.L.R. 20 Bom. 611.

[3] Cf. also the position of a trader on borrowed capital, in *Hammurabi*, 100, 101.

[4] *Nathubai* v. *Mulchand*, 5 Bom. H.C. 196

not "equitable" to do so—it is interesting to speculate what, *e.g.*, Lord Cottenham would have said of an equity which allowed a mortgagee in possession to make greater profits than one out of possession. And though Telang J., in the case already quoted, attempted to rectify this decision and restore the common sense of the rule, a subsequent Full Bench [1] regretfully decided that it was too late to do so. A Full Bench of the Madras High Court [2] went so far as to hold that the rule had been abrogated in cases of mortgages by the Transfer of Property Act, and to doubt whether it had not been abrogated altogether by the Indian Contract Act. This ruling has not been followed elsewhere in India. But the judges who delivered it were judges of distinction; and it seems almost incredible that they can have been entirely misled by the transparent logical fallacies on which their argument rests. The fact that Hindu Law does not make writing essential to a mortgage figures in their judgment as a positive rule "requiring no writing"; and they do not explain how the Transfer of Property Act as a complete code could tacitly repeal this law without at the same time repealing, *e.g.*, the section of the Indian Limitation Act, 1877, relating to suits on mortgages.[3] One may venture with all due respect to suggest that their Lordships were, perhaps, moved by a feeling of inelegancy. They may have thought it anomalous that such a rule should apply in the Presidency town and not to the rest of the Presidency; that a single Hindu rule, however salutary, should remain as an excrescence on a body of law otherwise completely English.

The most noticeable characteristic of the Indian learned classes of to-day is, as Lord Ronaldshay has pointed out, a fierce intellectual patriotism; and it is something of a disappointment, therefore, to notice a tendency, at any rate among the lawyers of the Presidency towns, to apologize for the *dam dupat* rule. Dr. Priyanath Sen, in his Tagore Lectures on "Hindu Jurisprudence," shows a good deal of ingenuity and much learning in illustrating Hindu Law from other systems. But when he comes to the rule of *dam dupat*, he ignores the Roman parallel, and can only speak of the restriction as having perhaps been useful at one time "when people were more simple than at present" (p. 311), although he clearly understands the scope of the rule, which is to prevent accumulations becoming

[1] *Gopal Ramchandra* v. *Gangaram*, I.L.R. 20 Bom. 721.
[2] *Madhwa Sidhanta* v. *Venkatara-manjulu*, I.L.R. 26 Mad. 662.
[3] Cf. *Ramconnoy* v. *Johur Lall*, I.L.R. 5 Calc. 867.

too burdensome for the debtor to clear off. Mr. Framjee R. Vicajee, in a very careful and clear account in this *Journal*,[1] appears to think that the rule has survived its usefulness, and is impressed, as everyone must be, by the anomaly of applying it in one district and not in another. Mr. I. B. Sen,[2] though he is apparently the only Hindu lawyer to note the Roman parallel, does not appreciate the full force of that parallel; and though he speaks of the rule with very proper affection, refers to it as the "only surviving relic of a remote past," and would apparently repeal it, relying on education as the sole remedy for the evil aimed at. He is, in fact, an unrepentant utilitarian; though the usury conditions in London to-day (to which he refers) might warn him against supposing that even universal education can afford to despise the doubtless feeble assistance of the law.

II. **Rome.**—*Securus judicat orbis terrarum*: there is no need to be apologetic or to refer to the rule as a relic of the remote past. It was introduced into Roman Law in the golden age of that august system at the height of Roman civilization; and it has survived in full force down to the present day.

We can give within a few years the date at which the rule of *alterum tantum* makes its first appearance in Roman Law. It was manifestly unknown to the Emperor Pius, who had recourse to a fictitious imputation on a plaintiff to achieve a similar result: (D. 22.1.17): *Parum juste præteritas usuras petis quas omississe te longi temporis intervallum indicat qui eas a debitore tuo ut gratior apud eum videlicet esses petendas non putasti.* But it was in force by the time of Caracalla, from one of whose constitutions (C. 4.32.10), we may infer that it was a new law which stood in need of interpretation: *usuræ per tempora solutæ non proficiunt ad dupli computationem. Tunc enim ultra sortis summan usuræ non exiguntur quotiens tempore solutionis summa usurarum excedit eam computationem.* It is commented on by Ulpian (D. 12.6.26): *Supra duplum autem usuræ et usurarum usuræ nec in stipulatum deduci nec exigi possunt et solutæ repetuntur*—the reference to *usurarum usuræ* is interesting, as showing that the absolute prohibition of compound interest, *anatocismus*, though never repealed, was already semi-obsolete in Ulpian's time[3]; and the

[1] *Journ. of Comp. Leg.*, New Series, vol. ii, pt. 3, pp. 464–472.

[2] *Journ. of Comp. Leg.*, New Series, vol. xi, pt. 1, pp. 168–176.

[3] There are also two apparent references to the rule ascribed to Papinian himself: D. 22.1.9 pr., and 22.2.9.1; but one is not in point, and in the other the words *non ultra duplum* are probably a gloss.

same is notoriously true of attempts to limit the rate of interest. *Alterum tantum*, in fact, was a civilized expedient superimposed upon the failures of ruder times.

Justinian's Empire was heavily burdened with debt and the tax-paying agriculturist largely in the hands of the moneylender. A great part of his attention therefore, particularly in the later novels after the restraining influence of Tribonian was removed, is devoted to making more stringent the laws against usury. But it cannot be said that his efforts in this direction are particularly happy. He enacts a panic-stricken series of stringent new restrictions on the rate of interest, based, it is interesting to note, on a caste system. An *illustris* can only exact half the interest possible to a trader; and even the interest allowable to the latter would not in most cases be remunerative. He strives to render agricultural property inalienable, and thereby to deprive the agriculturist of the power of borrowing money at all, a policy which, if successfully enforced, could only result in driving land out of cultivation. He reduces the rule of *alterum tantum* to meaningless nonsense by enacting that it shall apply not only to arrears of interest, but to all interest paid or unpaid,[1] and he endeavours to prevent interest being added to principal even in novation of contract! For one only of his efforts, if it had stood by itself, could a case be made out; namely, that in which he sweeps aside the effect of a rule which had crept into the Roman Law similar to *Nathubai* v. *Mulchand* (*supra*), and decides that *alterum tantum* shall apply to cases of pignus.

It is pretty certain that the greater part of this legislation of Justinian was still-born: we may doubt if it was even viable. At any rate, when we come to the Glossators we find that they treat Justinian's innovations with silent contempt[2]; and in compliance with the well-known rule, *ubi non est glossa, ibi non est jussum*, the form in which the rule of *alterum tantum* has survived to the present day in Roman-Dutch Law, in the recently repealed Roman Law of Germany and in other Roman systems, is that in which it commended itself to Caracalla and Ulpian, no less than to Manu and Gautama and Bocchoris.

[1] Novellæ, 121, 138. One must admit that this particular absurdity reappears in the Basilics, 23.78.

[2] It is curious that economic historians of the Middle Ages devote so much space to the Canonist prohibition of usury and commonly ignore the Civilian doctrine Yet surely from every point of view, including success as measured by general acceptance, the Civilians better deserve study.

Conclusion.—All over the world, it is submitted, this rule of *dam dupat* or *alterum tantum* has shown itself to be the only successful law against the evils of usury. That it meets all those evils, nobody would suggest; it does not, for instance, meet the rare case of the man who is weak enough to promise an excessive rate of interest, yet strong enough to go on paying it punctually. There will always be some room for judicial discretion, such as is provided for in the Indian Usurious Loans Act, X of 1918. But it is more than ordinarily true in India, a country with nearly two thousand judges and no civil juries, *optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi. Dam dupat* provides in Coke's words,[1] "a golden and straight metwand," rather than the "uncertain and crooked cord of discretion." It is so simple that no debtor, however stupid, can be in any doubt where he stands or what effort is required to clear him. No creditor, on the other hand, can have anyone but himself to blame if he allows his money to lie idle and infructuous after the limitation is reached—the fact that he does so is of itself proof presumptive that the rate of interest originally charged was too high. No legitimate business can be throttled or hindered in any way by the rule, for high risks justifying high rates of interest will naturally only be taken for short periods. Call it a rule of thumb, if you will: all Statutes of Limitations or Acquisitive Prescription are rules of thumb, as are also all *presumptiones juris*: the idea that law can dispense with an artificial element is a phantom.

Cannot the Government of India take its courage in both hands and rectify the present anomalous position, not by repealing the rule, but by making it of universal application? The Musulmans could not object; for, as is well known, the Islamic prohibition of usury is far more stringent. The commercial world would not object, for commerce is built up on quick returns and would not be touched. We should be spared such scandals as the accumulation of interest in *Sahu Ramchandra* v. *Bhup Singh*,[2] and *Raghunath Prasad* v. *Sarju Prasad*.[3] In both these cases the security was absolute, and the rate of interest, though high, was not unusual: in the former Rs. 200 borrowed on January 6, 1883, had mounted by May 26, 1913, to what the Privy Council rightly call the appalling sum of Rs. 22,131; in the latter, Rs. 9,999 borrowed on May 27, 1910, had mounted

[1] 4 Inst. 38.
[2] L.R. 44, I.A. 126.
[3] L.R. 51, I.A. 101.

by May 8, 1921, to Rs. 112,885 : in eleven years the stipulation for interest at 24 per cent. with yearly rests had magnified the sum covered by the mortgage more than elevenfold. Let no one suppose that these two cases are in any way exceptional ; they are typical of the daily pabulum of civil courts in every part of India, save those fortunate localities where the *dam dupat* rule survives.

Is it, perhaps, too bold to suggest to the Committee now considering usury in England, that a similar provision, while injuring nobody, would at least restrict one of the many evils with which they have to deal ? And freedom of contract, that legal Ark of the Covenant, would be untouched.

EXTENT OF CRIMINAL RESPONSIBILITY OF AN ACCESSORY IN ROMAN-DUTCH LAW.

[*Contributed by* E. L. Matthews, Esq., K.C., C.M.G.]

In December 1924 the Appellate Division of the Supreme Court of South Africa gave a judgment in a criminal matter which may be of interest to readers of this *Journal*, in that the judgment illustrates certain differences between the English common law and the Roman-Dutch law in regard to the responsibility in criminal law of those who, without taking any active part in the commission of a crime, (*a*) counsel or assist the actual criminal, or (*b*) knowing subsequently to the commission of a crime that it has been committed by a particular person, assist that person in concealing the crime or in evading justice. The judgment illustrates also a trifling difficulty in combining the substantive law of one system with the adjective law of another system. The judgment is concerned only with the criminal responsibility of (*b*), though the position of (*a*) is discussed. The question may be put thus: Has the person who is called in English law "an accessory *after* the fact" committed an offence under Roman-Dutch law? If so, what offence? There were also further questions, which are of procedure and to be determined by statute, viz.: How is such an accessory to be charged, and what verdict is possible on an indictment for the principal offence? The judgment was in *Rex* v. *Willem Mlooi and three others*. The facts were simple and practically undisputed. A native, S, committed a murder. The other three, of whom Willem Mlooi was one, assisted S in disposing of the body of the murdered man in a river, they knowing that he had been murdered, and murdered by S. It must be assumed, in the absence of evidence on the record, that these three accessories were not privy to the intention of S to commit the murder or any other crime against the deceased. The judge, presiding at the trial, relying on a certain decision by which he was bound, directed the jury as follows: "If A knows that a man has been murdered by B, and with that knowledge assists B in concealing the body in order to escape detection, then, according to our law

[*i.e.* the Roman-Dutch common law], A is guilty of *murder*." On this direction the jury convicted all four accused of the murder, and they were sentenced to death. In his report to the Governor-General, the presiding judge stated that " in English law, under such circumstances, the accused, other than S, would be accessories after the fact; but under our law they would properly be charged, as principals, with the crime of murder."

At the instance of counsel for the three accessories the point was reserved for the consideration of the appellate division as to whether the judge had misdirected the jury as to the law.

Before the judgment of the appellate division is discussed it will be convenient to state shortly some completely accepted principles of Roman-Dutch law in regard to counselling, procuring or assistance in the commission or furtherance of a crime.

In the first place, there is no distinction in Roman-Dutch law between a " felony " and a " misdemeanour." Consequently, there is no such distinction as exists in English law, between principals in the first and in the second degree. All persons who aid and abet in the commission of a crime are *socii criminis*, and are indictable and punishable as if they were the actual perpetrators of the crime. In order, however, to inform accused persons in indictments of the facts upon which the allegations of crime are based, indictments have been frequently drawn so as to indicate that the accused is an aider and abettor of another in the commission of a crime. Such person may also, if he counsels, procures or commands the commission of a crime, be an accessory *before* the fact, though the expression is in South Africa not correctly used; for, as just pointed out, " felony " and " misdemeanour " are unknown terms in South African law. Consequently, there can also be no distinction between " principals " and " accessories." The " accessory before the fact " and " the principal in the second degree " are, however, recognized in the language of section 139 (2) of the Criminal Procedure Act 1917 of the Union, which provides that a " person who counsels or procures another to commit an offence, or who aids any person in committing an offence, may be charged in the same indictment with the principal offender." In other words, the Procedure Statute based, it is assumed, on a correct knowledge of the substantive common law, classifies together principals in the second degree and accessories before the fact: for they are all *socii criminis*.

The position of a person who associates himself beforehand with the commission of a crime was, therefore, well settled and the

principles are probably common to every system of law. It is, therefore, of little importance whether such a person is called " principal in the second degree " or " accessory before the fact " or " *socius criminis*." But the question whether a person who intervenes to assist the criminal *after* the crime without knowing beforehand that a crime was to be committed was not settled and necessitated other considerations. Such a person, *ex hypothesi*, has no *mens rea* in relation to the commission of the crime. It would seem, therefore, that he can hardly be properly regarded as *socius criminis*.

In *Rex* v. *Matanda*, 1923, App. Div., the Appellate Division had had before it the case of a person who, on an indictment for murder, had been convicted as an accessory *after* the fact. The question recently considered was then left open ; the conviction of murder was then confirmed, as the point had not been taken whether such a verdict was competent on the indictment ; and the accused had not, in the particular circumstances, been prejudiced by the form of the indictment.

The questions, therefore, which arose for decision in the recent case of *Rex* v. *Mlooi and three others* were : (1) whether the person who is loosely but conveniently called an " accessory *after* the fact " can properly be regarded as a *socius criminis* and therefore found guilty of the crime charged against the principal ; (2) whether, if the accessory after the fact is indicted as if he were a principal (because there is no distinction between principals and accessories) he may be convicted *on that indictment* as an accessory after the fact.

The answer to the first question, being a matter of substantive law, depended on the weight of authority to be found in the Roman-Dutch textbook writers. The answer to the second question depended on the interpretation to be placed on certain provisions of the Criminal Procedure Act, to which reference will presently be made. That Act, following some South African statutes nearly 100 years old, is based almost entirely on *English* criminal procedure. But, even on matters of substantive criminal law, South African Courts frequently derive much assistance from English judicial decisions. In the present case, however, no such decisions could be in point.

I. After examining the textbook writers, the judges of the appellate division arrive at the conclusion that the weight of authority distinguishes the degree of guilt of a *socius criminis* from the degree of guilt of an accessory who only assists the actual perpetrator

after he knows of the perpetration of the crime. A brief reference may here be made to the authorities relied upon. Moorman (*Misdaden*, pp. 583–4), in expressing very definitely the view that an accessory after the fact is not a *socius criminis*, and giving examples of such accessories, states that " such a person must be more leniently punished because he has, under the circumstances, no guilt in connexion with the crime itself nor is he a co-partner in it " (" *Om dat zoo iemand in zoo een geval, tot be misdaad geen schult heeft, noch ook een mededeelgenoot van de misdaad wordt* "). Carpzovius (*Hoogendorp*), ch. 80, sections 30–32, expresses views much to the same effect, and comes to the conclusion that help given by the accessory after the fact is not really assistance in the perpetration of the wrongdoing, " and the persons who give such help are not punishable to the full extent of the penalty applicable to the principal offenders." Boehmer (*Meditationes in Const. Crim. Car.*), in dealing with the case of partners in crime (including mandators, conspirators and instigators), specially discusses the position of those who become accessories after the fact (*quot quot consummato sceleri accedunt*) ; their liability to punishment arises, not because of the act of a third person, but because of their having deliberately associated themselves with it. He regards as such accessories those who hide the wrongdoers or receive the stolen property " *nisi asylo in antecessum promisso conspireverinti nam hoc casu sunt vera causa sceleris ; illo vero tantum damni vel periculi ex crimine nati.*"

Quistorp (ss.57–8) is of the same opinion, and points out that a man is a *socius* who shelters a thief in *accordance with a prior engagement*, but not otherwise ; though he is punishable, in the *latter* event, at the discretion of the judge.

These authorities the Appellate Division accepted as negativing the idea that an accessory can properly be regarded as a *socius criminis*, but it pointed out that there may be exceptions to the rule, although those exceptions are more apparent than real. One of such exceptions brought it to refer to the decision on which the judge presiding at the trial had based his direction to the jury (*Rex* v. *Brett & Levy*, 1915, Transvaal Prov. Div. 53). A thief had been assisted in the disposal of the stolen property by a person who knew, after the theft, that the property had been stolen. It was held, in a considered judgment, that such person had rightly been convicted of theft. The reasoning, however, was this. Theft, while the stolen property remains in possession of the thief, is a continuing crime, and therefore assistance subsequently rendered by one who

had no part in the theft constitutes part of the *fraudulosa contrectatio*, which is the essence of the offence.

It was held, therefore, by the Appellate Division, in the case now under discussion, that the accused, though accessories after the fact to a murder, could not properly be convicted of murder, and that the jury should have been so directed.

II. The question then had to be considered whether any verdict other than of murder was possible on the indictment. That had to be considered because the Appellate Division is empowered by the Criminal Procedure Act, 1917, s. 374 (*d*) and (*e*) on the hearing of an appeal (*inter alia*) "to give such judgment as ought to have been given at the trial, or to make such order as justice may require."

The capital sentence on the accessories had already been commuted by the Governor-General to a term of imprisonment.

Section 242 of the Criminal Procedure Act enacts that in all cases not specially dealt with therein the accused may be convicted of any offence which is *included* in the offence charged in the indictment. That section obviously could not apply because, under the earlier part of the judgment, the crime committed by an accessory after the fact, though connected with, is different from and forms no part of the principal crime. Another section, however (234), provides specially for certain alternative verdicts which may be returned on an indictment for murder. They are: culpable homicide (manslaughter): assault with intent to commit murder; assault with intent to do grievous bodily harm; common assault; and, under another section, in the case of an indictment for child-murder, concealment of birth. Another section permits, on any indictment for any crime, the return of a verdict of guilty of an attempt to commit that crime.

Nothing in these sections, therefore, could be held to justify, on an indictment charging the accused with murder, a verdict of guilty of being accessory after the fact to the murder. These very provisions were, in themselves, regarded by the Court as a strong argument in favour of an intention on the part of the legislature to exclude such a verdict on an indictment for murder. Any doubt, however, which might have existed in the mind of the Court was removed by section 139 of the Act. That section, to which reference has previously been made, provides that any number of persons charged with committing or procuring the commission of an offence, *or with having, after the commission of the offence, harboured or assisted the offender,*

may be charged *with substantive offences* in the same indictment with the principal offender; or the procurers, harbourers and assisters may be so charged, although the principal offender is not charged or amenable to justice. It was clear, therefore, that the Legislature, in dealing specifically with the offence of being an accessory after the fact, used language indicating that the charge of such an offence was to be dealt with as such, and not as a crime covered by the principal offence. The Court, therefore, came to the conclusion that, on the indictment for *murder*, the three accused, as accessories after the fact to the murder, could not be convicted of being accessories after the fact. It has been seen that they could not be convicted of murder. The convictions, therefore, were set aside. On this reasoning, however, the three accessories had never been "in peril"; and so there would seem to be nothing to prevent their indictment again as accessories after the fact to the murder and convicted as such.

THE ILLEGITIMATE CHILDREN (AFFILIATION ORDER) ACT (NORTHERN IRELAND) 1924.

[*Contributed by* James Graham Leslie, Esq., J.P., *Senator of the Parliament of Northern Ireland.*]

In so far as it affected Ireland, the special problem of those unwanted children who are born out of wedlock had never received the serious and effective consideration of any legislative body until the Parliament of Northern Ireland, by passing into law the measure which is the subject of this article, made a genuine and determined endeavour to grapple with some at least of those practical difficulties which are the result of illicit procreation.

Poor Relief.—A dual explanation may be offered. Not only was the inception of definite legislation relating to the adminstration of poor relief—the branch of social service to which the maintenance of any destitute child, whether legitimate or illegitimate, has always been attributed—far from contemporaneous throughout the British Isles, but also, owing to various reasons which it is unnecessary to examine here, Ireland, with a disastrous uniformity, was excluded from the ambit of the English Statutes which took account of bastardy.

The English statute [1] referred to in the February number of this *Journal*,[2] was of a period subsequent to Poyning's Act of 1495 [3]; but, independently of that, the internal condition of Ireland at the time,[4] and for some two hundred years thereafter, has to be remembered. Something was done in 1771,[5] and more was attempted in the earlier years of the nineteenth century,[6] but it was not

[1] 18 Eliz., c. 3.

[2] *Journ. of Comp. Leg.*, Third Series, vol. vii, p. 33, "Uniform Illegitimacy Act and the present Status of Illegitimate Children," reprinted from the *Columbia Law Review*.

[3] 10 Hen. VII, c. 22 (Irish).

[4] The date of the English Statute was 1575–6.

[5] See the Irish statutes of 11 & 12 Geo. III, c. 11 (Workhouse and Foundling Hospital in Dublin), and c. 15 (Relief of Deserted Children and Duties of Overseers).

[6] 1806 and 1818.

until the reign of William IV that Sir George Nichols made a tour of the country and submitted the report on which the first Irish Poor Law Act was based. The creation of the Irish Poor Law can, therefore, only properly be dated from the year 1838, when it was enacted [1] that every husband should be liable to maintain his wife and any children (under the age of fifteen), whether legitimate or illegitimate, which she might have at the time of her marriage with him, as well as his own children, and further, that the mother of any bastard child should be liable to maintain such child. And any existing liabilities were saved by a proviso.[2]

Boards of Guardians.—Some further advance was made in 1863, when Boards of Guardians were given power to sue a man for the maintenance (up to the age of fourteen), of any illegitimate child of his who might be in receipt of poor relief. Such cases were made triable at the Civil Bill (County) Courts, since all magistrates at that time, *virtute officii*, were Poor Law Guardians.

The Act of 1863 [3] soon fell into desuetude, owing principally to the reluctance of the mothers to give the necessary evidence. Spasmodic efforts were made to put the Act in force—sometimes by bringing it to the notice of particular individuals *in terrorem*—but the results were not encouraging, and the putative father almost invariably escaped liability as regards his child.[4] But defendants in actions for seduction—which have never been uncommon—were not always quite so fortunate.

Passage of Present Bill.—And so the first Parliament of Northern Ireland found the way clear for the approach of a problem which, on the statistical side, at all events, did not appear unmanageable, for the number of illegitimate births only averages from twelve to thirteen hundred a year, *i.e.* something below 4·25 per cent. of the children born alive in Northern Ireland.[5] The Government was aware that the public conscience had long been uneasy on the subject, and that there was a general desire that action should be taken speedily, and on lines consistent with that modern liberality of thought which undoubtedly tends towards a full recognition of

[1] The Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56, s. 53).

[2] Writing in after-years (about 1856), Sir George opposed special provision for illegitimate children in Ireland, basing his argument on the modesty and good character of the young women who had come under his observation and on abuses which he thought occurred in England.

[3] 26 & 27 Vict. c. 21. Now repealed in Northern Ireland.

[4] Senator Long, Chairman of the Londonderry County Council and of the Limavady Board of Guardians, Senate Debates, vol. iv, col. 142, May 20, 1924.

[5] Still-born children are not registered in Northern Ireland.

the rights and interests of the child, and requires the inculcation, under sanction, of the doctrine of paternal duty.

Accordingly, when, in March, 1923, Senator Greer asked a question in Parliament, he received a reply which almost amounted to a definite promise that legislation would be promoted by the Government.[1] A year later the Minister of Home Affairs, Sir Dawson Bates, moved the second reading of the necessary bill.[2]

The bill was very sympathetically received by the House of Commons, it being at once seen that, although the mother was not to be entirely divested of the burden, her partner in transgression was no longer to escape. Discussion was both serious and prolonged; numerous amendments directed to extending the beneficence of the measure were suggested, and several such amendments were accepted by the Government.[3]

When the bill was submitted to the Senate it was again meticulously examined and was materially altered. All of the Senate's amendments were accepted by the Commons, only two of them leading to comment by unofficial members of that House.

Comparison with the English Act.—This article, however, is not concerned so much with the making of the Act as with a comparison of the law it established in Northern Ireland with that which now obtains in England. Apart from details of administration, the variations, with only one exception,[4] make for advance beyond the English limits. Instances of the advance are: greater elasticity in the terms of an Affiliation Order; standardization of the age of benefit; recognition of commutation; the attempt to secure a continuation of contribution, even if the putative father be dead, and provision for the funeral expenses of a child dying *after* the making of an order in respect of him.

Administration will be based on Irish summary jurisdiction practice, but, as will be seen, the Courts to which the cases are referred are to be of special constitution.

It becomes convenient to adopt the sequence of the Act.

Application for Summons.—It is provided that the mother—that

[1] Senate Debates, vol. iii. T. M. Greer and Marquess of Londonderry, cols. 27–31. March 15, 1923.

[2] Commons Debates, vol. iv, col. 265 *et seq.*, March 20, 1924.

[3] See Commons Debates, 1924, vol. iv, *passim*.

[4] The age to which the putative father's contribution, in the case of male children, can be made to run.

is to say, any single woman who is with child or who has been delivered of an illegitimate child—may apply to any local magistrate for a summons requiring the man whom she declares [1] to be the father of such child to appear before a Court of Summary Jurisdiction. The term "single woman" (without prejudice to accepted legal definitions) is made to include a widow, a married woman living separate from her husband, and a married woman not living separate from her husband, who at the time of her marriage [2] had been delivered of an illegitimate child. If the child is in receipt of poor relief, the application may be made by the appropriate Board of Guardians.

A Court of Summary Jurisdiction, when hearing and determining any matter under the Act, is to be constituted of a magistrate appointed under the Constabulary (Ireland) Act, 1836,[3] *sitting alone*. The magistrate, if a child has been born alive,[4] and if the testimony of the mother is corrobated by other evidence in some material particular, and after the man has had an opportunity of being heard, may make an order adjudging the man to be the putative father of the child.

If the summons is applied for before the child is born the *hearing* of the case is to be deferred, and the Court—that is, the resident magistrate—may adjourn the hearing from time to time as may be required in order to secure the attendance of the mother, *or any other necessary witness*.[5]

The limits of time within which application for a summons can be made follow the English precedents, but opportunity has been taken to give effect to a recommendation in the report of Mr. Whitbread's Committee,[6] by enacting the judgment of the then Mr. Justice Hawkins in the case of *R.* v. *Evans*. That case related to the construction of the expression "ceased to reside in England, within the twelve months next after the birth of such child," which occurs in s. 3 of the Bastardy Laws Amendment Act, 1872,[7] and the

[1] In writing upon oath (s. 2 (4)).

[2] When the bill left the Commons the words "was with child of, or" appeared here. The words were struck out in the Senate *after* the case of *Russell* v. *Russell* ([1924] A.C. vol. xiii) had been decided by a majority of the House of Lords. Debate Senate, vol. iv, cols. 215–218. T. M. Greer and Marquess of Londonderry, October 21, 1924.

[3] Commonly called a "resident magistrate."

[4] The decision in *R.* v. *de Brouquens* (1811), 14 East 277, is thus definitely enacted.

[5] The words in italics mark an extension of the English Act of 1845.

[6] Select Committee on Bastardy Orders, H. of C. 236, 1909.

[7] 35 & 36 Vict. c. 65.

words of the learned judge [1] had the effect of changing and correcting an interpretation of the Act of 1872, which had been received and followed for over twenty years. The position in this class of case now is that neither in England nor in Northern Ireland can a self-imposed and temporary absence operate to ensure oblivion.

The proposal to confer the jurisdiction on resident magistrates exclusively was traversed in and out of Parliament. It was urged that such magistrates were not appointed for the exercise of civil jurisdiction, that local knowledge would be of value in dealing with the evidence, and that women magistrates ought to be allowed to participate in the hearings and the judgments. Against this, it was said that ordinary magistrates in Ireland were unaccustomed to such cases, which were likely to present legal difficulties as regards procedure and evidence, that there might be a risk of the introduction of local feeling, and that a resident magistrate sitting in Belfast was already clothed with special powers.[2] Compromise was readily arrived at. A direct provision was inserted in the bill enabling the original summons to be issued by any local magistrate, and parliamentary opposition was withdrawn. The weight of instructed opinion was probably with the Government, for resident magistrates enjoy public confidence. They are chosen with discretion—it has been usual in the past to select men of legal knowledge, and it has been decided that in future the qualification of some years of actual practice, whether at the Bar or as a solicitor, will be insisted on as a condition of appointment.

Liabilities of Putative Father under an Affiliation Order.—An Affiliation Order may provide under such conditions as the Court sees fit, for the payment by the putative father of the expenses incidental to the birth of the child, of the funeral,[3] should the child die before the making of the order, and for the payment of a weekly sum of money, not exceeding twenty shillings, in any one week for maintenance and education.[4] Similar payments may be required under English law, and the maximum of the latest English Act has been adopted.[5] The wording of the English enactments was

[1] "A man ceases to reside all the time he is absent. It is like desertion—a continuing state of facts" (per Hawkins, J, in *R.* v. *Evans and others* (*JJ.*) *and Parry* [1896] 1 Q.B. 228. Laurance J., was also on the Bench.

[2] See 1 & 2 Geo. V, c. 58, s. 3.

[3] Subject to a limit of £5.

[4] Education is free in Northern Ireland, but there were thought to be possibilities which rendered it undesirable to abandon a time-honoured phrase.

[5] 13 & 14 Geo. V, c. 23, The Bastardy Act, 1923.

deliberately changed in order to give the Court a discretionary power—which it is doubtful if the English Courts possess [1]—of providing for a weekly sum not necessarily constant throughout the currency of the order.

The weekly payments are to continue until the child, if it lives so long, being a male, attains the age of 15 years or, being a female, attains the age of 16, or marries under that age. These are not the English limits, for the Act of 1872, previously cited, makes the age 13 for both sexes, although the Court has power to decree a continuance up to the age of 16 years. The explanation is the difference between the English and the Irish Poor Law; but it was thought well to give a female child the protection of an extra year.

The third section, after enacting that liability shall not determine on the death of the mother,[2] introduces a new principle quite at variance with English law—that is, the continuance of liability after the death of the putative father. It is sought to effect such continuance by giving power to make the personal representative a party to proceedings for the enforcement of the order, and by giving the Court—still the resident magistrate—the power to order the payment of such lump sum out of the estate of the deceased as the Court thinks just. Such sum may not exceed the aggregate to which the father could have been liable had he lived, and must be applied for the benefit of the child in accordance with the directions of the Court.[3]

The date from which weekly payments are to run is to be fixed by the Court, but must be within twelve months before, or after, the date of the order, and in no case before the birth of the child.

Power to vary Affiliation Order on Fresh Evidence.—Further provisions of the third section deal with the method of payment and then (subsection 4) powers are given to a Court of Summary Jurisdiction,[4] upon fresh evidence to the satisfaction of the Court, to vary an Affiliation Order by altering the amount of the sums payable thereunder, by directing that the payment of such sums shall cease

[1] See *The Justice of the Peace*, vol. lxiii, p. 620, September 30, 1899.

[2] It is submitted that this enactment was necessary, having regard to s. 5 of the Act, *infra*, on account of the judgment in *Jones* v. *Morgan* [1909] 1 K.B. 564.

[3] Both on second reading and in Committee the writer opposed the introduction of this principle, but did not go to a division, expecting that (as proved to be the case) a right of appeal would be given. See *Senate Debates*, 1924, vol. iv, cols. 149, 150, May 20, and cols. 227, 231–233 and 235–237, October 21.

No use, so far (July, 1925), appears to have been made of these extraordinary powers.

[4] Not necessarily the Court (resident magistrate) which made the original order.

or be revived, by changing the payee, and by ordering the payment by the putative father of the funeral expenses (up to £5) of any child who may die while an Affiliation Order in respect of him is in force.

The first and second of these provisions were the cause of much discussion, and doubt was expressed as to whether or not similar powers in affiliation cases had been given in England by an Act of 1914.[1] That is a matter as to which the superior Courts do not appear to have made any pronouncement, and as to which an intimation of opinion would be inappropriate here.[2] So far as the merits of the question are concerned, both advantages and disadvantages may be expected to reveal themselves in particular cases, and it seems idle to speculate as to the probable preponderance. Such a power of variation certainly exists in Northern Ireland, under the clumsily worded Married Women (Maintenance in case of Desertion) Act, 1886,[3] and in England under the Act of 1895,[4] which in that country takes the place of the earlier measure. It is expected that popular sentiment, which is generally in favour of elasticity in remedial statutes, will approve of this permissive power being conferred on the resident magistrates, but it cannot be denied that difficulties as regards the evidence appear to be inevitable.[5]

The third provision is in force in England. The fourth was inserted in the Northern Ireland Act, in the interests of infant life protection. It is illogical to restrict the liability of a putative father to the case of a child dying before an order is made, and it seems desirable to withdraw an ignorant or designing woman from the temptation to postpone her application until after the child is dead. Such postponement might not impossibly result in the death of some child whose life could have been saved had moneys for his nourishment been in weekly payment. Both of the two latter provisions accord with common sense, and to neither of them does the difficulty as to fresh evidence seem likely to apply.

[1] Criminal Justice Administration Act, 1914 (4 & 5 Geo. V, c. 58, s. 30 (3)).

[2] The Acts of 1918 (Affiliation Orders) (Increase of Maximum Payments) 8 & 9 Geo. V, c. 49 and 1923 (13 & 14 Geo. V, c. 23, s. 2) are not in point.

[3] 49 & 50 Vict. c. 52. The session in which this statute was passed closed prematurely, owing to the rejection of the first of the " Home Rule " Bills and the consequent dissolution of Parliament.

[4] The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). (The Licensing Act 1902 (England), 2 Edw. VII, c. 28, s. 5, and the Summary Jurisdiction (Ireland) Act, 1908, 8 Edw. VII, c. 24, s. 3, may also be referred to.)

[5] Except where depositions are taken in criminal cases the evidence given before Courts of Summary Jurisdiction is not officially recorded.

The Principle of Commutation.—In s. 4 the principle of the commutation of the weekly payments is admitted. Commutation can only be effected on the application of the putative father, and the sum paid must be dealt with as ordered by the Court. The innovation is distinct, but it may be thought that the interests of the child have been protected.

The following section (five) carries the principle still further, for it provides for an agreement between the man *alleged* to be the father and the mother which, when sanctioned by the Court, is to be a bar to any further proceedings to obtain an Affiliation Order in respect of the child concerned. And the resident magistrate is empowered to hear and determine the relative application otherwise than in open Court. Safeguards for the child are, again, inserted; but the section is remarkable alike for novelty and courage. It was not opposed in Parliament.[1]

Appeals.—Full powers are given for the enforcement of orders and for the recovery of any moneys due, and then, in s. 7, the right of appeal is provided for. Any order[2] made by the resident magistrate may be appealed against, as also a refusal to make an order. The appeal is to the Court of Quarter Sessions, which is to be constituted of the County Court Judge,[3] or Recorder sitting as the sole judge.

An order may be confirmed, quashed or varied, and, as in the Court below, the evidence of the mother requires corroboration in some material particular.

Collecting Officer.—By virtue of s. 8 the "collecting officer" makes his first appearance in Northern Ireland. Experience in England, noticeably in Liverpool, has shown that the interposition of an officer of the Court, as a receiver between man and woman, has been of great advantage. Such officials trace their origin to the Married Women's Act to which reference has before been made,[4] but their services in Affiliation Order cases were not availed of, until Capt. Jessel's Bill of 1914[5] received the Royal Assent. The provisions respecting the collecting officer inserted in the Northern

[1] Senator Greer, for many years in practice as a solicitor in Northern Ireland, and an accepted doyen of the profession, moved the amendments which resulted in the section.

[2] Other than a mere adjournment.

[3] In Northern Ireland the County Court Judge sits as Chairman at the Quarter Sessions.

[4] 58 & 59 Vict. c. 39, *supra*, p. 191.

[5] The Affiliation Orders Act, 1914 (4 & 5 Geo. V, c. 6).

Ireland Act are as nearly as may be identical with those included in the English statute.

Administration.—Succeeding sections deal with arrangements for administration, and do not call for special notice, though reference may be made to the admission of " expenses " of the parties,[1] as an addition to " costs " and to the requirement that a man under liability must keep the payee informed of his address.

Special provision, too, is made giving the mother power to take any step in pursuance of the Act, notwithstanding that she may not be twenty-one years of age, and thus an unfortunate girl, who has no relations—or worse than no relations—is offered all possible assistance in obtaining the benefit of the Act for her unoffending child. It is thought that this form of help will be of special value in obtaining the services of the collecting officer as the nominal complainant in cases where arrears have to be recovered.

Rule-making powers are taken and, finally, there is a saving of the liability of the mother to maintain her child.

Deletion of Clause regarding Mother's Death in Childbirth.—Before leaving the subject, attention should, perhaps, be drawn to a provision in the bill as it left the House of Commons, which does not appear in the completed statute. Philanthropic members suggested in Committee that a child might be left outside the protection of the Act, owing to the mother's death in childbirth, and in order to meet such a case the Government brought in an amendment which would have enabled an expectant mother who had taken out a summons to proceed to an intermediate hearing at which her evidence, and that of other witnesses, could be recorded and filed for use in Court after the birth of her child if she herself did not survive. It was explained to the House[2] that the amendment introduced a form of perpetuation of testimony hitherto unknown; but the clause was accepted, and therefore came before the Senate. The clause was vigorously attacked in the second Chamber, and was deleted in Committee. The arguments brought against the proposal were, briefly, that the death statistics did not indicate any necessity for such an arrangement[3]; that instances of the survival of the child when the mother died in childbirth were negligible as regards

[1] Subject to the discretion of the Court.

[2] R. D. Megaw, K.C., then Parliamentary Secretary to the Ministry of Home Affairs, *Commons Debates*, vol. iv, col. 608 April 8, 1924.

[3] The proportion of deaths among women who are with child—including those who die from some cause not connectedwith pregnancy—is in Northern Ireland about 5·8 per thousand births.

number ; that an interim hearing would be of no real value at the ultimate trial ; that proceedings, in the circumstances, would be indecent and revolting ; that the additional appearance before a magistrate would discourage rather than induce applications by the mothers, and that the State would thus lose the best possible allies in the fight for the welfare of the child, and, finally, that from both the moral and the medical points of view the probable effect on the mother herself could only be such as to constitute a danger.[1] The opposition was successful, and the House of Commons did not seek the restoration of the clause ; its excision was accepted—not without comment,[2] but without any protest in the lobby.

Such, then, is the Act which came into force in Northern Ireland, on January 1st last.[3] The supporters of the measure claim that, taking it as a whole, it is, so far as its purpose, which is limited to securing the sustenance of the illegitimate child, goes, both complete and liberal ; they are watching the Act at work and they have confidence that it will prove effective. Several orders have already been made and upheld on appeal ; no order has, so far, been reversed, nor have the superior Courts been called upon to interpret any word or phrase in the Act.

Experience elsewhere clearly points to a reduction in infantile mortality as the result of parallel legislation, and if such an effect is produced in Northern Ireland a Parliament which is still at its beginnings will be entitled to congratulation. And perhaps the Act may serve to promote forethought, and so assist the moral training of the young.

[1] *Senate Debates*, vol. iv, J. G. Leslie, col. 222. Col. Sinclair C.B., M.D., M.S., M.P., col. 225. October 21, 1924.

[2] Coroner Morrison, M.D., *Commons Debates*, vol. iv, col. 1592. November 5, 1924.

[3] The reference to the statute is 14 & 15 Geo. V, c. 27. The statutes of Northern Ireland are numbered and published separately from those of the Imperial Parliament.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Division of the Colonial Office.—The time has passed when the division of the Colonial Office and the creation of a new Secretaryship of State for Dominion Affairs could arouse more than mild interest and approval in the Dominions. In 1911, when the matter was keenly discussed by the Imperial Conference, and received the earnest consideration of the Imperial Government, the division might have seemed an important mark of the advance in status of the Dominions. Doubtless it would have been conceded had the Dominions been united in desiring it; but Sir Wilfrid Laurier, as usual, was suspicious of anything new, General Botha was lukewarm, and Mr. Harcourt as Secretary of State for the Colonies was determined, if possible, to maintain in his own hands both the affairs of the Dominions and those of the colonies and protectorates.[1] Since then, the grant of Membership of the League of Nations to the Dominions has lessened the demand for formal change, and the division of the Colonial Office would hardly have been carried through but for the conviction of Mr. Amery that the step was one which ought to be taken. It must, however, be admitted that the value of the creation of the new office has been rather seriously diminished by the decision that the ministry should still be left in the hands of the Secretary of State for the Colonies. The result is naturally to give the innovation the appearance of a somewhat meaningless extravagance, for the additional departmental expenditure involved will not, it is clear, be accompanied by any increase in the efficiency of the departmental work. That has long ceased to be a matter of contention; if any real change is to be made it must lie in the provision of a new parliamentary chief. Mr. Amery has expressed the view, which was urged by the Imperial Government at the Conference of 1911, that the Prime Minister could not possibly

[1] See Keith, *Responsible Government in the Dominions*, iii, 1506 ff.; *Imperial Unity and the Dominions*, pp. 564, 565.

undertake the duties of the office. The argument, however, is not exactly satisfactory. It is perfectly clear that in present circumstances it is the duty of the Prime Minister and the Secretary of State for Foreign Affairs to keep in the closest touch with the Dominions in order to maintain a common foreign policy, and there is plainly no room for a Secretary of State for the Dominions with any independent position as opposed to these two ministers. The solution of the position probably would be the acceptance by the Prime Minister of the Secretaryship of State, coupled with the appointment of a deputy who would deal with that considerable mass of minor business affecting the Dominions which ought to be under ministerial supervision, but is not sufficiently important to be worth the attention of the Prime Minister. The alternative of appointing an independent minister but subjecting the department to special care on the part of the Prime Minister amounts to much the same thing ; but, from the point of view of recognition of the status of the Dominions, it is of inferior value. In either case, the work to be done by the Prime Minister must be the same, but the Dominions may justly claim that their status should receive adequate recognition by the acceptance by the Prime Minister of the Secretaryship of State dealing with their affairs. Constitutionally it is noteworthy that the creation of the new office required no legislation. The British tradition of simplicity in these matters stands strongly in contrast with the necessity of legislation in the Dominions for the addition of ministers to the Cabinet, a process not always accomplished without considerable difficulty, as recent experience in the Union of South Africa shows.

The Dominions and Foreign Affairs.—The communications which have passed between the Imperial Government and the Governments of the Dominions regarding the Geneva Protocol of 1924,[1] and the negotiations for a security pact with Germany indicate clearly enough the fundamental difficulties of concerting a foreign policy which will be acceptable to the Empire as a whole. It is inevitable that the Dominions should view European commitments from an entirely different point of view from the United Kingdom, and that they should favour an attitude of detachment which seems impracticable to a Government engaged daily in discussions of European political movements. The attitude of the Dominions may fairly be characterized generally as one of withdrawal from active participation in foreign affairs, and the adoption

[1] Parl. Paper Cmd. 2458 ; *cf.* Cmd. 2368.

of an attitude of non-intervention in European imbroglios. The difficulty in the way of achieving this object is the existence of the Covenant of the League of Nations, by which the Dominions have voluntarily bound themselves, and which is based on the theory, not of non-intervention, but of active interest in the maintenance of peace in Europe and throughout the world. Of course this obligation has long been resented by Canada, but its efforts to escape from the duties imposed by Article X of the Covenant have not yet been successful in bringing about a formal amendment of that instrument, though considerable sympathy has been shown by the League Assembly with the very restricted interpretation which the Dominions would wish to be placed on the obligations laid down. The United Kingdom, on the other hand, recognizes that it cannot evade the obligations of Article X and those arising under the Treaty of Versailles, and its policy has been based on the view that further specification and definition of its duties would be a clear gain, whether the method selected be that of the protocol or of the pact.[1] Different as these two plans are, they have in common the aim of removing ambiguity as to British undertakings, and, therefore, appeal to the British public as improvements on the Covenant ; to the Dominions, on the other hand, they seem to impose on them definite and serious obligations in lieu of a vague liability, which they could interpret into nothing if a case of appeal under Article X arose. The alternative to a purely negative attitude on the British side, which in different ways both the Labour Government and the present administration held to be impossible, is the conclusion of an agreement, which will not apply to the Dominions without their assent. It is going too far to say that such action will mark the beginning of a wholly new chapter in British policy, with regard to the Dominions, as is suggested by General Smuts in his denunciation of the proposed security pact.[2] It must be remembered that the treaty with France of June 28, 1919, which was intended to secure France from German attack but which never became operative, though it bound the whole Empire, expressly stipulated that no obligation under it to afford active assistance would rest on the Dominions unless and until accepted by their Parliaments. The new suggestion, which will leave acceptance of liability under the security pact optional to the Dominions, will not, therefore, be a formal change of fundamental importance ; it may, however,

[1] *Cf.* Parl. Papers Cmd. 2429 and 2435.

[2] See *The Times*, July 13, 1925.

be General Smuts's view that, whereas the treaty of 1919 was concluded with the approval of the Dominion representatives, any security pact now arrived at will not carry their endorsement, and that a definite breach in the conduct of imperial foreign policy will thus be caused.

Dominion Consultation on Foreign Affairs.—In the meantime, no progress can be registered in regard to making the Dominions effective partners in imperial foreign policy. Some stress, indeed, has been laid by the Prime Minister of the Commonwealth and Mr. Amery on the device by which the former has a special representative in London who is accorded facilities for acquiring full information on matters regarded by Mr. Bruce as of special importance, and it has been suggested that the practice might be adopted by the other Dominions, while mention has also been made of the alternative system of sending a Dominion Cabinet Minister to reside in London, and to act as a liaison officer between his own and the Imperial Government. It cannot, however, be said that either arrangement has any wide support in the Dominions. Mr. Hughes, for example, has explained, effectively enough, that what is needed is not secret information possessed by the Prime Minister of a Dominion, which cannot be shared by the public, but a wide understanding of foreign problems and British policy based on full and up-to-date information, and both he and the Government of New Zealand have made it clear that there are grave objections to the stationing in London of resident ministers. The objection to this proposal seems to reduce itself in the long run to the fear that despite all safeguards, the minister would be regarded by the British Government as having power to bind his Government, with results unsatisfactory to both parties ; if he were, on the other hand, reduced strictly to the functions of an ambassador as the transmitter of information and proposals, then he would serve no purpose which could not be as effectively carried out by the use of the High Commissioner. This argument, it must be noted, ignores the personal factor in the case ; candid consideration shows that there is much both in the way of providing information and in conveying the views of one side to the other, which could more effectively be done by a minister than by a High Commissioner, who, under the existing rules of appointment, is not a politician, and, as holding office for a fixed period of years, need not be even a nominee of the Government of the time. The attitude, however, of New Zealand is largely based on her general outlook on the issue of foreign relations which has

recently been reiterated by Sir Francis Bell,[1] and Mr. Coates.[2] Matters not directly affecting the Dominion are entrusted in the main to the control of the Imperial Government, and in these circumstances it is obvious that very little necessity for the maintenance of a resident minister arises. Canadian policy, again, has settled down in the direction of the maintenance of diplomatic relations direct with the United States, regarding this aspect as more important than cognizance of European affairs, while the Union of South Africa is pursuing with increasing determination a policy of isolation, though the Prime Minister has made it clear that, as far as he himself is concerned, he regards the policy of secession, though legitimate under the system of constitutional relations affecting the Empire, as utterly unwise in the interests of the Union. There may also be noted the grudging assent [3] ultimately elicited from the Union Government to the principle that under the new tariff of the Union, Britain shall not in any event be placed in a less favourable position than any foreign power. It must be recognized, however, that the concession seems to be limited to the case of the United Kingdom, and not extended to the Empire as a whole,[4] thus contemplating the possibility of according more favourable treatment to a foreign State than to another part of the Empire. The same particularism is to be noted in the decision to press forward next session with the scheme for the creation of a special flag, the co-operation of General Smuts being secured in arriving at a satisfactory design. With this may be contrasted the hasty withdrawal of a similar proposal in Canada. There is, indeed, some difficulty in seeing the necessity for the change of flag ; the ensign might well be regarded, like the sovereign, as one of the points in which, without loss of any kind, the unity of the Empire might appropriately be symbolized. Sir Robert Borden, it is satisfactory to record, may now be cited as supporting what has always seemed the common-sense view [5] that in preparation for sessions of the Assembly of the League of Nations the Dominion and British representatives should take counsel together, and that the opportunity of such meetings should be taken to permit of annual discussion of imperial foreign policy. It is, however, still clear that the proposal has not

[1] New Zealand Legislative Council, July 2, 1925.
[2] Speech at Auckland, June 17, 1925.
[3] Minister of Finance in House of Assembly, May 4, 1925.
[4] Contrast Lord Ripon's rule in 1895; *Responsible Government in the Dominions*, iii, 1116.
[5] Keith, *Constitution, Administration and Laws of the Empire*, p. 49.

attracted general approval from Dominion Governments, which are still reluctant to involve themselves in responsibility for international relations.

The Dominions and the Treaty Power.—In an interesting discussion[1] of Canada and the treaty-making power, a subject familiar to readers of this *Journal*, Mr. N. A. M. Mackenzie revives the suggestion that the omission of the name of the King in the abortive treaties between Great Britain and Northern Ireland and the Union of Soviet Socialist Republics was intended to imply that the treaties applied to the territories named only, and not to the Empire as a whole, and that the device might be convenient for adoption by Canada, or the other Dominions. The suggestion, doubtless, was originally prompted by remembrance of the difficulty which was raised by the United States Senate regarding the ratification of the Halibut Fisheries Treaty of 1923 with the United States, which was concluded in the name of the King, but which applied only to nationals and inhabitants and vessels and boats of Canada, whereas the Senate advised ratification subject to a rider making it clear that the provisions of the treaty were to be applicable to all British subjects and British vessels.[2] But the view taken of the Russian treaties is clearly untenable for reasons which have already[3] been explained. On the mere technical ground of the form of treaty, there can be little room for doubt; the reason alleged by Mr. Ponsonby was that there was no person, in the case of the Soviet Government, corresponding to the King, as the head of the State, which naturally rendered it simpler to use phraseology which negatived the mention of the sovereign. The specification of Northern Ireland in lieu of Ireland was, of course, dictated by the objections raised without adequate ground earlier in the year by the Irish Free State to the use of the term "United Kingdom of Great Britain and Ireland," in the treaty with the United States regarding the liquor traffic. But, none the less, the reduced title still stood for the only fully sovereign power in the Empire, which possesses the power to bind by its conventions all British subjects, whether in the Dominions or elsewhere. Similarly, in the Anglo-French Treaty of September 18, 1897, regarding Tunis, no mention was made of the King, but merely of the United Kingdom of Great Britain and

[1] *American Journal of International Law*, xix, 489–504.

[2] See this *Journal*, Third Series, vol. v, pt. iv, pp. 161–8. On October 21, 1924, the treaty was ratified without the proposed rider.

[3] This *Journal*, Third Series, vol. vii, pt. i, pp. 106, 107.

Ireland, but the provisions of the treaty were obviously applicable to all British subjects. The vital element, it must be remembered, is not the terms of the heading of the treaty, but the full powers under which it was negotiated, and these were expressed in the usual form. A truer understanding of the position is revealed by M. Bourassa in his recent attack on imperialism, when he reminded Canadians that it still appertains to the Crown, on the advice of the Government of Great Britain and Northern Ireland to declare war, and automatically to involve the whole of the Empire, despite the autonomy asserted by the Dominions, in a state of belligerency. Thus the outcome of the negotiations at Locarno, in which the Dominions have taken no part, might lead to their being involved in a war, even if they were formally exempt from any obligation to render active assistance to the United Kingdom.

The Legal Position of High Commissioners.—Sir Robert Borden is now responsible for a renewal of the suggestion that the office of High Commissioner and resident minister should be combined by making the High Commissioner a member of the Dominion Cabinet, and authorizing him to take part in meetings of the Imperial Cabinet when invited to be present. From another point of view the inconvenience of the status of a High Commissioner as a quasi-ambassador, but without the privileges accorded to an ambassador by imperial legislation in accordance with international usage, is revealed in the recent case of *Isaacs & Sons, Ltd.* v. *Cook*.[1] The question then was raised whether an action would lie against the High Commissioner of the Commonwealth in respect of a report as to the sale in England of Australian fruits, which was alleged to constitute a libel on the plaintiffs. Sir John Simon, for the plaintiffs, endeavoured to draw a distinction between commercial reports, sent by a High Commissioner, and political reports made by an ambassador, but the Court ruled that the reports, even on commercial matters, of a High Commissioner to his own Government were absolutely privileged, and that the privilege covered the necessary publication to clerks in England. It was further held that publication in newspapers in Australia, if legal there, would afford no ground for action in England under the recognized rule that no action lies in England in respect of an act which is not tortious in the place where it is committed[2]; but the Court left open the question of the effect of the sale, at Australia House, of Australian newspapers

[1] 41 *The Times* L.R. 647.
[2] Dicey and Keith, *Conflict of Laws*, pp. 694 ff.

containing the report in question. Had the High Commissioner enjoyed ambassadorial privileges, no question of bringing an action could have arisen,[1] and, whatever the result of the action may be, there is clearly ground for investigation of the anomalies of the position. It is clear that it should not be possible to seek damages from the High Commissioner of a Dominion because his Government authorizes the publication in the press of the Dominion of reports on matters of fundamental importance to the Dominion, and copies of papers containing these reports come to England.

The Privy Council and the Lemieux Act.—The regret felt in Canada at the decision of the Judicial Committee against the validity of the Industrial Disputes Investigation Act,[2] is sufficiently shown by the revival of the movement in favour of securing that the final decision of Canadian questions shall be left to the Canadian Courts, though it may be doubted whether popular feeling has been very deeply stirred. To remedy the situation, as far as is practicable under the existing constitution, legislation has been passed to amend the Act of 1907 so as to confine its operation within the sphere of federal authority, and, if necessary, further legislation may be proposed. Fortunately, this sphere is by no means narrow; the Act covered the industries of mining and public utilities employing ten or more persons, and these were defined as including steam and electric railways, steamships, telegraph and telephone lines, gas and electric light, water and power works. Of these industries, navigation and shipping, interprovincial railways, telegraphs and telephones, and works operated by aliens or Dominion corporations, fall under Dominion authority. In other cases industries situated in one province may be made subject to the Act by being declared by Parliament to be for the general advantage of Canada or of two or more provinces, and thus being brought under federal jurisdiction. Or a dispute, not covered by these cases, may be declared by the Governor in Council to be within the scope of the statute by reason of real or apprehended national emergency, while provincial legislation may allow of the application in certain cases of the Dominion Act. Much may be done by expedients such as these to mitigate the effect of the Committee's decision; the alternative of provincial action, suggested by the Committee, is rendered of somewhat dubious value by the evidence adduced by the Dominion Ministry of Labour, which shows that, save in Quebec, the

[1] *Conflict of Laws*, pp. 216 ff.

[2] See this *Journal*, Third Series, vol. vii, pt. i, pp. 65–8.

provinces have done little effective in this regard; it is significant that, in the case of Ontario, disputes between employees of electric railways and their employers were dealt with in fifty-one cases between 1907 and 1923 by federal machinery, while, under the local Act of 1906, only five strikes were dealt with up to 1922. The preference for federal intervention was doubtless due in large measure to the federal provision forbidding strikes or lock-outs pending investigation.[1]

Canadian Provinces and Indirect Taxation.—The Judicial Committee has once more had to determine the nature of direct and indirect taxation in the case of *Attorney-General for Manitoba* v. *Attorney-General for Canada*.[2] The question there arose of the validity of an Act of Manitoba imposing a tax on persons selling grain for future delivery, whether as principals, or agents; the Act endeavoured to secure the position by declaring the tax to be a direct tax, and to be imposed solely for revenue purposes. This declaration was, as usual, disregarded by the Committee, which insisted on considering the point of substance, not of form. It, accordingly, applied to the case the same reasoning by which in *Cotton* v. *The King*,[3] it held invalid Quebec legislation imposing on persons concerned merely with the administration of estates succession duties, which they would necessarily merely pass on to the beneficiaries. It was held that the tax could be distinguished from a licence duty, and that it was clearly imposed upon such persons as factors or elevator companies which would necessarily include the payment in the ultimate fixing of the price, so that the tax would fall in effect to be paid by persons other than those upon whom it was imposed, and thus was an indirect tax, which the provincial Legislature could not impose. The Committee naturally ruled that it was impossible to save even in part the validity of this Act, for it could not be assumed that the Legislature would desire to have upheld for certain classes only legislation deliberately intended to be of general application.

Quebec Succession Duties.—The case of *Brassard* v. *Smith*[4] brings nearer to finality the long judicial disputes over the extent

[1] See *Judicial Proceedings respecting Constitutional Validity of the Industrial Disputes Investigation Act*, 1907, and *Government Intervention in Labour Disputes in Canada*, for which I am indebted to Mr. J. Murdock, Dominion Minister of Labour. The Ontario Act of 1914 represents the consolidated form of earlier legislation.

[2] 41 *The Times* L.R. 409.

[3] [1914] A.C. 176. Cf. *Burland* v. *The King* [1922] 1 A.C. 215.

[4] 41 *The Times* L.R. 203.

of provincial authority in the matter of raising succession duties, though it must be noted that the Judicial Committee was careful to make it clear that the issue of *ultra vires* had not been raised before it, and that, therefore, it must not be regarded as being committed on the head. The point there at issue was simple; the Quebec legislation imposes succession duties in respect of all property actually situate within the province, even if the deceased was not domiciled therein, and the issue was whether certain shares in Quebec companies, or companies with their head offices in Quebec, could be held to be situate in the province. The Canadian Courts ruled that shares could have a local situation, and that, where the head office and registry were in Quebec, the succession duties of Quebec could be levied. The only disagreement between the Courts in Canada arose as regards shares in the Royal Bank, a Dominion corporation with head office in Quebec, but with a share registry office at Halifax, in which the deceased's shares were duly registered. The Supreme Court and the Committee are agreed in holding that, assuming that shares can have a local situation, in this case the situation was Nova Scotia, since at Halifax only could the shares be transferred, although for general purposes the head office of the bank is in Quebec. In their decision the Committee expressly held that the presence of the register of shareholders, and not that of the head office, was the *ratio decidendi* in *Attorney-General* v. *Higgins*,[1] in which it was held that shares registered in Scotland were located there.

Sabbath Observance.—The complications of federal government are somewhat painfully revealed in the discussions of the validity of s. 1 of the Lord's Day Act Amendment Act, 1923, of Manitoba.[2] Regulation of work on Sunday seems *prima facie* to be a matter well within provincial authority, either as being connected with property and civil rights in the province or as dealing with matters of a local character; but the Judicial Committee in *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*,[3] somewhat unexpectedly—and perhaps not altogether convincingly—ruled that the matter was one falling under the exclusive authority of the Dominion as a question of criminal law. The Dominion, by an Act of 1906, very sensibly endeavoured to regulate the matter with due regard to provincial feeling, and, *inter alia*, it prohibited running Sunday excursions for pleasure, " except as provided by any provincial Act or law now

[1] 2 H. and N. 329.
[2] [1903] A.C. 524
[3] 41 *The Times* L.R. 225.

or hereafter in force." The plain sense of this enactment was to leave it open to the provinces to legislate, and Manitoba in 1923 did so, sanctioning Sunday excursions, though the Act was, very prudently, not brought into force until the Court of Appeal of Manitoba had given an advisory judgment to the effect that the enactment was valid. From this judgment an appeal was brought to the Judicial Committee by a body interested in preventing the violation of the sanctity of the Lord's Day. It was, not unnaturally, claimed that, if prohibition of Sunday work was a matter of criminal law, permitting it must equally be regarded as a question of criminal law, and therefore *ultra vires* the province. The Committee, however, evaded the difficulty by holding that, if passed before 1906, the provincial Act would have properly been regarded merely as legislative approval of doing on Sunday things which stricter Sabbatarians might regard as improper, but which were not prohibited by the criminal law—as was, in point of fact, the case in Manitoba before the Dominion Act of 1906; it would accordingly have been allowed full effect by the Dominion Act, and, as that Act contemplated future legislation by the provinces, it equally must be held as enacted in 1923 to be valid. The solution is ingenious, but even the ability of the Committee does not make it wholly attractive, and one must sympathize with the suggestion made in the Court below that it would be simpler to treat the provincial legislation as in effect Dominion legislation, by delegation or reference. The Committee clearly preferred to avoid touching on this issue in view of the possibility of further complications arising.

Tasmanian Money Bills.—A remarkable, but not very satisfactory, effort has been made by the Assembly and Government of Tasmania to establish the belief of the Lower House that the Legislative Council has no legal right to amend money bills. The Council, which is elective, has claimed consistently this right, and, acting on the claim, in November 1924 passed the estimates of the year only subject to many changes, in most cases of rather minor detail. The Assembly sought, by the usual procedure of a Conference, to secure the withdrawal of the amendments, but failed, and then proceeded, by a majority of 17 to 10 votes, to direct the Speaker to present the bill, without the amendments, to the Governor for assent. The Acting Governor, Sir Herbert Nicholl, the Chief Justice, inquired from the Secretary of State for the Colonies what his duty was, and in reply was informed that the question of action was in the first place a matter for the consideration of his ministers; "if, after

such consideration, and after their law officers have given their formal opinion in writing that assent can be properly given, they then advise you to assent, and if you assent accordingly, responsibility will rest exclusively with your ministers, and no question can arise as to the constitutionality of your actions." Ministers thereupon advised assent, backing their advice with the opinion of the Attorney-General, and assent was duly accorded. A similar procedure was followed with the Land and Income Tax Bill, from which the Council had deleted an important clause, the assent in this case being given by the newly arrived Governor, Sir James O'Grady. It cannot seriously be doubted that the assent is without validity and is a mere nullity, for the Constitution of Tasmania gives no power,[1] either expressly or by necessary implication to the Assembly, to pass any bill over the head of the Council, nor does it forbid amendments of money bills by the Council, which, as elected, is representative of the people. What, however, is of special importance is the view of the Secretary of State for the Colonies that the Governor is entitled to act on ministerial advice, backed by the opinion of a political law officer—contrary to the view of the permanent legal advisers of the Government, even if the action advised seems clearly illegal. The doctrine is entirely consistent with the view [2] that a Governor should be made as nearly as possible an exact parallel in position of the King in the United Kingdom; but it must be pointed out, first, that it is extremely dubious if the King could constitutionally assent to an obviously invalid measure, and, second, that the Governor is still legally responsible for his actions, and that, until this responsibility is removed by legislation, he may, despite ministerial advice, find himself liable to suit in the Courts. In the present case, this contingency is of minor consequence, but the episode is of value as raising once more very clearly the distinction between the constitutional and legal responsibility of a Governor.

Appointment of Australian State Governors.—The episode, emphasizing as it does the formal character of the functions of the Governors of the States of Australia, lends weight to the renewal by the Governments of all the States save Victoria of the suggestion that the Governors should be normally Australians. It is, in fact, clear that, if the Governor is not to exercise any discretion of his own, and may ignore the law on the bidding of his ministers, it is not in the slightest degree necessary that he should be selected from outside

[1] Keith, *Responsible Government in the Dominions*, ii, 630, 631.
[2] Keith, *War Government in the Dominions*, pp. 244 ff.

the Commonwealth. One argument formerly employed against the proposal laid stress on the importance of preserving appointment from outside as affording a mark of the direct connexion between the Crown and the States which is a feature of the Commonwealth Constitution as opposed to that of Canada, where the Lieutenant-Governors of the provinces are selected by the Dominion Government. It is not, however, obvious that any real harm would result if the choice of the Crown normally fell on Australians ; it is not suggested that the Crown should be required to act on the advice of the local ministry as to appointments, though, of course, care would be taken to secure that the nominee was not distasteful to the Government over which he was to preside. On the other hand, there seems to be no useful purpose served in seeking to lay down any hard-and-fast rule. It would be perfectly simple, and probably satisfactory to all concerned, if it were decided by the Imperial Government to undertake in future appointments to give special consideration to the possibility of appointing an Australian in each case. It would be quite easy to imagine circumstances in which a State Government might desire an appointment to be made from outside. In the past it has been the rule to regard local connexion as nearly, if not quite, a disqualification for the office of Governor ; in the future, as in a recent case, it might well be that such connexions might *prima facie* be regarded as a special ground for appointment, other things being equal. It must be remembered that it is now by no means easy to secure suitable candidates for the Australian Governorships, and that it is not satisfactory for a State to find that its chief office is being offered in vain to residents in London, when well-qualified local men are being ignored. The movement in Australia, it must also be recognized, is not on the part of Labour only ; even before that party became of first-class importance, the subject had often been discussed both within and without State Parliaments.[1] The case of the Governor-General of the Commonwealth stands in a different category ; under the existing system he should serve as an important link in connecting the Commonwealth and the British Governments, and, though this side of his functions is probably insufficiently developed, there are excellent reasons for maintaining the practice of appointment from the United Kingdom, with the full knowledge and approval of the King.

Dominion Boundaries and the Prerogative.—The expedition

[1] Keith, *Responsible Government in the Dominions*, i, 78 ff. ; *Imperial Unity and the Dominions*, p. 30.

from Maine of Captain Macmillan with a commission from the Governor of the State to annex to the State such islands as he may discover has called attention to the question of the Canadian and Australian claims to the islands lying between these Dominions and the north and south poles respectively. It must be remembered that neither Canada nor the Commonwealth is a completely sovereign State, and both have defined boundaries which they cannot alter of their own action. The only means of effecting changes in their limits is that of special Imperial legislation, which would doubtless be accompanied by Dominion legislation, or action under the prerogative, as rendered statutory by the Colonial Boundaries Act. As matters stand, the Governor-General of Canada has received such a delegation of authority from the Crown as would allow of the annexation to the Dominion of such polar islands as may not be already the property of foreign powers, and recent Canadian expeditions, especially those of Stefansson, have asserted the claim of the Dominion which extends to all the land lying north of the Dominion up to the pole.[1] The commission given by the Governor of Maine to Captain Macmillan purports to authorize disregard of this claim, but it is still uncertain whether the United States federal Government will ultimately dispute the Canadian claim or admit its validity, in which case action on behalf of Maine would be of negligible importance. The interest of the Commonwealth extends to Wilkes Land and the Victoria quadrant, but the prior interest of France, arising from the formal taking possession of Adélie Land in 1840 by d'Urville, has interposed difficulties to the admission of the suggestion by the Imperial Government, and constitutionally the Commonwealth is not in a position to take independent action in the matter.

The Crown in its Different Aspects.—That the House of Lords should have reversed the judgment of the Court of Appeal in deciding *The Attorney-General* v. *Great Southern and Western Railway Co. of Ireland*,[2] is hardly surprising, for the views of that Court were decidedly technical, and by no means easy to follow. But the most interesting feature of the case was the elaborate exposition of the nature of the liability created by a Government contract given by Lord Haldane. He repudiated effectively the doctrine that a contract with the Crown can now be regarded as, in essentials, similar to an ordinary contract. The doctrine applied to Newfoundland in

[1] House of Commons, June 1 and 10, 1925.

[2] 41 *The Times* L.R. 576; for the Court of Appeal see [1924] 2 K.B. 450

Commercial Cable Co. v. *Government of Newfoundland*,[1] is equally applicable to the United Kingdom. He who contracts with a Government department must realize that the payment for services or goods supplied is dependent on the will of Parliament, whose action is an implied condition of all such contracts. In the case in question, Parliament must be held to have transferred the duty of providing the fund, out of which the liability of the Crown to the company when it accrued must be met, to the Parliament of the Irish Free State. It thereby declared its intention of not itself providing the money out of the Consolidated Fund, and, even though there was no express transfer of the liability to the Irish Free State, the fact that it ceased to be a charge on the British Consolidated Fund implied that it became a charge on the Central Fund of the Irish Free State if the Parliament of that State decided to honour the obligation. The doctrine was accepted by Lords Dunedin and Carson, and the former, with the express approval of Lord Phillimore, protested against the view that there could exist a departmental liability as distinct from a liability, or quasi-liability, of the Crown. Lord Phillimore carried the matter to a logical conclusion when he laid it down that a petition of right could not be brought in the High Court to obtain a judgment against the Crown in respect of liabilities incumbent on the Government of a Dominion, because such liabilities would not properly be met by the Exchequer of the United Kingdom. This is plainly the true criterion of jurisdiction ; the question is not where the liability arose, but whose liability it is, and in this case Lord Phillimore had no difficulty in coming to the conclusion that the liability clearly attached to the Free State. The result may of course, as was hinted in the discussion, though the Lord Chancellor deprecated the doubt, be inconvenient to the claimants, who must depend ultimately on the decision of the Parliament of that Dominion for reimbursement ; but, on a broad constitutional point of view, it is obvious that the principle of the control of finance by the House of Commons might be gravely lessened in efficacy if ministers could validly bind the Crown to payments of any amount, without the necessity for parliamentary sanction.

The Status of the Air Council.—The position of governmental departments in relation to contracts is also made clear in the judgment of Lawrence J. in *Rowland and Kennedy* v. *Air Council*.[2] The case for the plaintiff rested on the alleged transfer to the Air Council of the obligations under contract of the Directorate of Military

[1] [1916] 2 A.C. 610.

[2] 41 *The Times* L.R. 545.

Aeronautics, the Admiralty Air Department and the Air Board, and the right of direct suit was based, *inter alia*, on the provision of s. 10 of the Air Forces (Constitution) Act, 1917, which provided that: "the Air Council may sue and be sued, and may for all purposes be described, by that name." The Council met the claim, partly on its merits, and partly by contending that they were not liable to suit in respect of a contract which was binding, if at all, on the Crown, and contended that the provision of the Act of 1917 was not intended to confer the right and liability of suit, but was merely a provision for convenience of nomenclature. The decision of the Court establishes the validity of the claim of the Air Council, both on the merits and on the technical ground.

The Irish Free State and the Judgments Extension Act, 1868.— In the case of *Banfield* v. *Chester*,[1] a further development occurred of the doctrine of the Court of Appeal in *Wakely* v. *Triumph Cycle Co., Ltd.*,[2] holding that the Judgments Extension Act, 1868, has ceased to apply to the Irish Free State. An appeal was brought in the new case from a decision of a Judge in Chambers affirming the refusal of the Master to allow the issue of a certificate of judgment under the Act of 1868 for registration in the Free State. There was cited to the Court the judgment in the Irish case of *Gieves, Ltd.* v. *O'Conor*,[3] which affirmed the continued application of the Act to the Free State, despite the legislation of 1922, which the Court of Appeal held to have terminated the application of the statute to Ireland. The Court of Appeal naturally could not recede from its own decision to the opposite effect, but it discovered a way out of the *impasse* by holding that an application might be made for a certificate under Order LXI, rule 7, though no endorsement could be made on the certificate that it was issued under the Act of 1868, nor could it derive any value from s. 1 of that Act. On the other hand, it was admitted that, having regard to the Irish case, it was not improbable that effect would be given to it in the Free State. There remains, however, the fact that a judgment of the Free State Court can no longer receive effect in England under the Act of 1868, and the case appears to be one in which definite arrangement, if necessary by fresh legislation, should be arrived at. The alternative, to make use of the principles of the Administration of Justice Act, 1920,[4] is still available, but it may be doubted whether a scheme meant to regulate the relations of Imperial Courts

[1] 41 *The Times* L.R. 563.
[2] [1924] 1 K.B. 214.
[3] [1924] 2 I.R. 182.
[4] Dicey and Keith, *op. cit.*, pp. 462–5.

in general is sufficiently effective to apply to countries immediately adjacent and in specially close and effective commercial relations involving legal transactions.

South Africa and Honours.—In anticipation of the visit of the Prince of Wales to the Union, on February 24 a motion was introduced by a Labour member in the House of Assembly praying His Majesty to be graciously pleased to refrain from conferring any titles on his " subjects domiciled or living in the Union of South Africa or the mandated territory of South-West Africa." The resolution, after a debate conducted mainly on party lines, was carried by the substantial majority of 24 votes, after an ineffective attempt had been made to limit the application to hereditary titles. It is curious that throughout the debate none of those taking part in it appeared to be aware that the proposed motion was merely a reproduction of a motion already adopted by the Canadian House of Commons. The Prime Minister himself alluded only to the earlier Canadian proposals of 1918, which were aimed at hereditary titles, ignoring the final decision of 1919, which covered the whole ground of honorary distinctions.[1] He expressed the determination of the Government in no event to make recommendations for honours, explaining the decision by the democratic sentiment of South Africa, and justifying what was alleged to be an interference with the royal prerogative by insisting that constitutional history was full of restrictions and transformations of the prerogative. The effect of the resolution and of the decision of the Government was seen in the fact that no honours were conferred on persons domiciled in the Union on the occasion of the Prince of Wales's visit, although that event was marked by the manifestation of the utmost cordiality on behalf of the Dutch elements of the population of the Union as well as of the British.

[1] Keith, *War Government in the Dominions*, pp. 281–4.

THE INSTITUTES OF COMPARATIVE LAW IN FRANCE AND ITALY.

[*Contributed by* PROFESSOR H. C. GUTTERIDGE, LL.D.]

THE Members of the Society of Public Teachers of Law have had the privilege of hearing a first-hand account of the origin and development of the French Institutes of Comparative Law from Professor Lambert of Lyons University, who was a guest of honour of the Society at its annual meeting held at the London School of Economics in July of this year.

The topic is one of considerable interest to English law teachers, as the comparative study of law—hitherto practically ignored by our law schools—is slowly but surely winning a place for itself among the recognized subjects of a legal curriculum. The atmosphere of suspicion—one had almost said of contempt—which has made it so difficult to obtain a footing for this branch of learning is gradually passing away, and Bowen's celebrated gibe that a comparative lawyer is " one who knows a little of the law of every country except his own " is no longer taken seriously.

It is, however, an undoubted fact that the leading part in the development of the study of Comparative Law has been taken by the French universities, and Professor Lambert's address to the Society largely took the form of a description of the various means by which a high degree of success has been achieved.

In broad outline the plan adopted has been the encouragement of research, which is not only the soundest, but, indeed, the only effective method. It is the experience of English law teachers that great difficulty is found in discovering topics suited for research work, as most subjects have been written threadbare, and the residuum does not lend itself to treatment except by very highly qualified experts. Comparative Law, on the other hand, is mostly virgin soil, and consequently well adapted to supply an outlet for the energies and ambitions of the advanced student. A like situation exists in the French universities, and thus no difficulty has been found in securing willing workers in this field of legal research. The problem has been to provide them with the necessary guidance and equipment for their task, and it is in this respect that we in England have much to learn from the experience of the French comparative lawyers.

Institutes of Comparative Law have been founded at Lyons, Strasbourg and Toulouse. The University of Paris has not given its official sanction to the movement, but as Professor Lambert points out, this is not in itself a matter of importance, as an equivalent exists at Paris in the flourishing school of Comparative Law carried on under the learned and enthusiastic leadership of Professor Lévy Ullmann.

The Institute at Lyons, inspired by the extremely energetic and able personality of Professor Lambert, is devoting itself to a comparative study of French and Anglo-American law, with an emphasis on the commercial and industrial aspects of the subject. This is not unnatural, for, as Professor Lambert pointed out in his address, the reason lies in the importance which this particular matter possesses in a city where the silk industry creates close relations with Great Britain and the United States, and also with the Far East where the influence of English mercantile law is becoming more and more prominent. The Institute of Comparative Law at Strasbourg, on the other hand, has wisely devoted its attention to the comparison of French and German law, and is doing valuable work in assisting to solve the manifold problems which have arisen as the result of the progressive substitution of French for German law in Alsace Lorraine. At Toulouse the Institute concerns itself with the comparative study of the laws of the Latin countries, chiefly Italy and Spain.

All these institutes, which are closely connected with the French Society of Comparative Legislation, are highly productive of original work. We may take as an instance the Institute at Lyons, which has published an extremely interesting and valuable collection of comparative studies of the law relating to combinations of employers and workmen in England, the United States and France. Professor Lévy Ullmann's pupils at the University of Paris have published a series of excellent monographs dealing with the Comparative Law of Business Corporations in England and in France. But these results have only been attained in the face of considerable difficulties which confront all students of Comparative Law, whatever their nationality may be. Professor Lambert summed them up as consisting in the first place in differences of legal terminology, and secondly, in lack of books on the law of the foreign country with which the comparison is being made. The first obstacle is one which calls for action on the part of comparative lawyers generally. No dictionary of legal terms and phrases which is capable of universal application is available at the moment, and a work of this kind is very badly needed, not only by comparative lawyers, but also by others. The library question is a very serious one, and can only be overcome by co-operative action in the form of an exchange of information and of documents by the various societies which are charged in each country with the duty of promoting the study of Comparative Law. To use Professor Lambert's words:

> The question of intellectual co-operation is, as the result of the action

of the League of Nations, one of the leading questions of the day. . . . There is no ground upon which this co-operation may more fruitfully exercise itself than in dealing with the science of the law.

Having dealt with the methods pursued by the French Institutes of Comparative Law in general and the results achieved, Professor Lambert proceeded to deal with what is perhaps the most interesting feature of the curriculum of the Institute over which he himself presides at the University of Lyons. It takes the form of team work on the part of the teacher of civil law, the comparative lawyer, the economist and the sociologist. As he pointed out, one reason why the study of Comparative Law has been under a cloud in the past is that it has suffered from well-intentioned but insufficiently informed efforts on the part of its votaries. The laws of different countries, in other words, cannot be compared effectively unless due regard is paid to varying social and economic conditions. It is not sufficient to ascertain the differences which exist without endeavouring to trace the reasons underlying them. Hence the student of Comparative Law must not confine himself to the purely legal aspect of the question, but must also inquire into the nature of the relations which the law of any given country is designed to govern. He illustrated this by reference to industrial law, but possibly an even more cogent example still is to be found in certain branches of mercantile law. It would, for instance, be idle for a student of the Comparative Law of Banking (which is a topic of the greatest interest to business men) to proceed with his task unless he had some knowledge of the principal variations in the practice of bankers in the countries under consideration. He can only gain this if he is in a position to consult an expert on the question, and the facilities afforded by the Institute at Lyons render this an easy matter.

Unquestionably difficulties have arisen in the past, owing to an unwarranted assumption that a rule of law which may work well in one country is equally sound when applied to conditions prevailing elsewhere. Without going into details, it will be sufficient in this connexion to refer to the breakdown of the attempt to secure uniformity in relation to the Law of Negotiable Instruments, and to the somewhat dubious success of the movement for the unification of the law relating to bills of lading. In other words, the service which the comparative lawyer can render to the community does not consist merely in pointing out the similarities or differences between various systems of law, but must include an examination of the causes which have brought about this result, and an investigation into the possibility of compromise, in order to secure the desired end without the violation of fundamental conceptions of the rights and duties of individuals.

In conclusion, Professor Lambert stressed the undoubted fact that what he termed " mobile law," *i.e.* the law of contract, and in particular the law of commercial contracts, presents the most fertile field for the

comparative lawyer. Other domains of the law are so governed by national customs and prejudices that they do not lend themselves very readily to comparison from the point of view of the constructive jurist, however interesting they may be to the student of legal theory or the legal historian. On the other hand, he would probably not dispute the statement that lawyers of all nations have much to learn from one another, and that a wider range of study is, therefore, admissible. To use his own words again :

> We have drawn from our own law all the lessons of a practical nature which it holds. . . . What we need in order to face the legal problems of the present with a largeness of spirit must be sought in bodies of law other than our own.

The forward movement in connexion with the study of Comparative Law is, however, not confined to the French universities. The newly founded Academy of Comparative Law which recently held its first meeting at the Hague is a welcome sign of the progress which is being made. Not only will it provide a common meeting-ground for representatives of the various systems, but it should also go far to prevent the overlapping and waste of effort, which is an ever-present danger in all comparative work.

Another noteworthy achievement is the proposal emanating from the Italian Government for the establishment at Rome of an International Institute for the Unification of Private Law. Up to the present the status of Comparative Law in Italy has approximated very closely to the position which it has occupied in England. In both cases it has been the Cinderella of legal subjects, and as such has been thrust into the background. Professor Sarfatti of the University of Turin has for some years, with undaunted courage and wonderful perseverance, pressed for a wider recognition of the subject, and now it seems as though victory was well in sight. Comparative lawyers of all nations will join in congratulating him on a result which is in no small measure a personal triumph. Writing recently on the principles which should govern the work to be carried on in an institute of this nature, Professor Sarfatti points out the necessity for much preliminary spade work before there can be any real hope of attaining unification in any branch of the law.[1] He points out that the legal systems of the world can be divided conveniently into the three following groups, viz., the Roman, the Anglo-American and the Mussulman systems of law.[2] In his view the work of comparison must be carried on in the first instance within the ambit of each group, it being left to an international body to co-ordinate the results so obtained. Unification, in other words, cannot be attained

[1] La Costituzione dell' Istituto Internazionale per l'Unificazione del Diritto Privato (*Riv. Int. di Filosofia del Diritto, Anno V, fasc.* 1°).

[2] See further as to this, *Sarfatti* : " Le obbligazioni nel diritto inglese in rapporto al diritto italiano " (Milan, Vallardi, 1924).

without the preliminary sifting process which comparison involves, and without some central controlling authority, which will be empowered to submit the products so obtained to a further process of comparison, and then to proceed with the infinitely more delicate task of unification.

It is hardly necessary to stress the difficulties which lie in the way of unification, or to point out that there are certain branches of the law which do not lend themselves to any such process. At the same time, the question of the unification of certain topics of private law has become one of practical importance as the result of the action which is being taken by the League of Nations. English lawyers can therefore no longer afford to neglect comparative studies, and this is a department of legal learning which the universities are best adapted to undertake, and which may well be confided to them.

THE WORK OF JUVENILE COURTS.

[*Contributed by* Miss N. Adler, J.P.]

No social development of recent years is fraught with more potential value than the efforts which are being made throughout the world of civilization to stem the tide of juvenile and adolescent delinqency at the source. The keynote of the International Prison Congress, held in London early in August 1925, was the prevention of crime rather than the punishment of the offender, and many of the departments of child welfare work in the United States, in Europe and the Dominions, and more recently in the South American States, both directly and indirectly, have this aim in view.

Need for Uniformity of Administration.—It is generally recognized that in a well-organized Juvenile Court, presided over by sympathetic magistrates, equipped with experienced probation officers and in close touch with the school medical department and the education authority, there exists the most effective machinery for helping the delinquent, or neglected child. But the Juvenile Court Movement is still a comparatively young movement, and like all organizations which gain their full impetus from local initiative and resource, there is much variety of standard in administration, both in this country and in America.

The Third Report of the Work of the Children's Branch of the Home Office,[1] issued early in August 1925, affords effective illustration of this fact, for it shows how diverse may be the arrangements governing the procedure of different benches of magistrates in methods of treatment of cases and in the use of probation.

That the whole matter is regarded officially as ripe for investigation in England is seen in the appointment this year by the Home Secretary of a Committee, under the Chairmanship of Sir Thomas Molony—

> To inquire into the treatment of young offenders and young people who, owing to bad associations or surroundings, require protection and training, and to report what changes, if any, are desirable in the present law and its administration.

In the United States the need for a common standard of organization and administration induced the Children's Bureau of the United States Department of Labour to appoint two investigators, Miss Lenroot and

[1] Price 9*d*. net, H.M. Stationery Office, Imperial House, Kingsway.

Miss Lundberg, to inquire into the organization and methods of ten Juvenile Courts in different parts of the country, serving cities of more than 100,000, but less than 1,000,000, inhabitants. The results of the inquiry, which was instituted in 1920 and 1921 but was brought up to date in 1924, have been published recently under the title of *Juvenile Courts at Work*.[1] Although the problems which are met in the United States possess certain features which are not found to any extent in this country, such as a large foreign population of heterogeneous races, incomplete provision of school accommodation to meet the influx of immigrants, and irregular attendance[2] the suggestions and criticisms contained in the Report are of considerable interest to English social workers.

The inquiry was directed primarily towards discovering successful methods of Juvenile Court procedure. The findings led to conferences on Juvenile Court standards, and the formulation by a committee of judges, probation officers and others directly concerned with Juvenile Courts of the principles which should govern their administration. This statement was adopted by a National Conference, held by the Children's Bureau, and the National Probation Association in May 1923. Since then, the National Probation Association has drafted a standard Juvenile Court Law, based on these standards, which was approved at the eighteenth Annual Conference of the Association in June 1924.[3]

Early Conditions.—To certain cities in the United States of America belongs the privilege of having been (with South Australia) pioneers in the work of establishing Children's Courts. In the Report on their origin, development and results prepared for the International Prison Commission of 1905,[4] by Mr. Samuel Barrows, the Commissioner for the United States, it was shown that, although Massachusetts had long taken the lead in securing a trial for children separate from the session for adults, the Children's Court "first went into operation in Chicago, July 1, 1899," to be followed, a few months later, by Judge Lindsay's famous Court at Denver. There had been legislation on the statute books of Colorado possessing many features of the Juvenile Court Law before the actual law passed in Illinois in 1899. "Yet, in spite of these laws, conditions in that State were intolerable. Over 2,000 Denver boys between 10 and 16 years of age were thrust into a wretched jail during the six years prior to the establishment of the Juvenile Court." [5]

Conditions in England at that period, although not so bad, were bad enough. In 1893 as many as 2,924 children under 16 were lodged in

[1] Children's Bureau Publication, No. 141, 1925. Single copies free, additional copies 45 cents, from the Superintendent of Documents, Government Printing Office, Washington, D.C.

[2] See *Social Problems and Education*, by Prof. Groves, Boston University. Longmans, 1925. Price 12*s.* 6*d.*

[3] *Juvenile Courts at Work*, p. 3.

[4] *Children's Courts in the United States*, Document 701, Government Printing Office, Washington, 1904.

[5] *Ibid.*, p. xi.

prison, of whom 278 were girls and 150 were children under 12 years old. The number had fallen to 1,211 by 1899–1900, and gave evidence of a further diminution on the opening of the first English Juvenile Court at Birmingham, in 1905.[1] The Children Act 1908, put an end to the imprisonment of children and young persons, and set up separate Courts for juveniles throughout the country.[2]

Juvenile Court Organization in the United States.—During the past quarter of a century all the United States but one have adopted legislation providing for the main characteristics of Juvenile Court organization. But a survey made in 1918, in order to discover the status of the Juvenile Court Movement and to serve as a basis for more intensive inquiries, showed that only 321 out of the 2,034 courts from which information was obtained could be classed as "specially organized" for dealing with children's cases by reason of presenting arrangements for (*a*) separate hearings for children, (*b*) an officially authorized probation service, (*c*) the recording of social information.

In half of the 48 States less than a fourth of the population was within reach of the Courts equipped for children's work, and in several States no special organization was reported. Specially organized Courts were found in all cities with populations of 100,000 or over, and were available to 70 per cent. of the total population living in cities of 25,000 to 100,000 inhabitants. Courts with special equipment for dealing with children were available to 29 per cent. of the total population of towns of 5,000 to 25,000, and to only 16 per cent. of the rural communities.[3]

The ten Courts which were included in the Study of Juvenile Courts at Work, undertaken by Miss Lenroot and Miss Lundberg, comprised the Boston Juvenile Court, serving the central district and a population, according to the United States Census of 1920, of 162,091 persons, the City of Buffalo (506,776 inhabitants), the County of Denver (population 256,491), the District of Columbia (437,571 inhabitants), Los Angeles County (population 936,455), Hennepin County (Minneapolis) (415,419 inhabitants), Parish of Orleans (population 387,219), San Francisco County (population 506,676), King County (Seattle), (389,273 inhabitants), and the City of St. Louis (772,897 inhabitants).[4]

Underlying Principles of Jurisdiction. — The type of jurisdiction exercised over the children in six out of the ten Courts under review differs in the main from that of the English Juvenile Courts in that it is "chancery or equity, and not criminal in nature." [5] The distinction is based on the view of the Court's function, that "the Court is concerned mainly with the conditions responsible for the appearance of the child," and not that the proceedings should be concerned chiefly

[1] *Report of the Commissioner of Prisons for the Year Ending March* 1906, Cd. 3169, p. 15. Price 2*s*. 4*d*.

[2] Children Act, 8 Edw. VII, c. 67, ss. 102 and 111.

[3] *Juvenile Courts at Work*, p. 1. [4] *Ibid.*, p. 8. [5] *Ibid.*, p. 8.

with the offence and the proceedings those in which "the child is considered as a wrongdoer." [1] The best type of American Juvenile Court "rests upon the principle that treatment is to be determined by the child's needs, and not by the nature of the offence." This question of principle is rightly regarded by Mr. Bernard Flexner and Mr. Roger Baldwin, in their work on *Juvenile Courts and Probation*,[2] as "fundamental." The point is also raised in the *Third Report of the Work of the Children's Branch*, issued in July 1925,[3] where the question is asked whether the Juvenile Courts of the country are so constituted as to enable them to fulfil their functions in the best possible way. And Mr. Harris and Dr. Norris remind us that, among many suggestions which have been made for altering the scope and character of the Courts, such as the raising of the age beyond 16, there are also—

> The possible application of the principle of the Chancery Court in place of a Criminal Jurisdiction, the simplification of the procedure and the special selection of magistrates.

These matters are now engaging the attention of Sir Thomas Molony's Committee.

A notable direction in which certain of the courts in the United States differ from ours is in the power given to them to deal, not only with juvenile delinquents, but with parents or other adults who contribute to delinquency or who commit an offence against a child. In those cases "it is of course necessary that the Court have criminal as well as equity jurisdiction." [4]

Cases of Adoption.—Certain Courts also deal with adoptions. This point is of special interest in view of the draft Bill contained in the *Second Report of the Child Adoption Committee*, just issued,[5] in which it is proposed that the Court having jurisdiction to make adoption orders shall be the High Court, and subject to any rules, any Court of Summary Jurisdiction, within the jurisdiction of which either the applicant or the infant resides at the date of application for the adoption order.[6] Presumably, such a Court of Summary Jurisdiction might be the Juvenile Court.

Divergence of Procedure. Type of Case and Age Limit.—Wide divergence of procedure is to be found in the American Courts both as regards the type of case dealt with and the ages of the young persons tried. In the two Californian Courts investigated, and in Denver, Minneapolis, St. Louis and Seattle, the law did not restrict the jurisdiction with reference to the seriousness of the offence. In Colorado, by a recent amendment of the law, crimes of violence, punishable by death

[1] *Juvenile Courts and Probation*, p. 5.
[2] Published by Grant Richards, 1915, p. 5.
[3] H.M. Stationery Office, p. 5. Price 9*d*. net.
[4] *Juvenile Courts at Work*, p. 8.
[5] Cmd. 2469, 1925. Price 3*d*.
[6] Clause 8, Draft of Adoption of Children Bill.

or imprisonment for life, when the accused is over 16 years of age, may be tried under criminal procedure in the Juvenile Court. In New Orleans the Court may deal with all cases, except capital offences; but the preliminary statements are taken in the Juvenile Court. The Boston Court has jurisdiction over all offences except those punishable by death or life imprisonment. If the Court was of opinion that the child's welfare, or the public interest, required that he be tried for the offence, instead of being treated as a delinquent, the Court might order the delinquency charge to be dismissed and the case to be taken under the General Law. In Columbia, in order to bring children within the jurisdiction of the Court, charges were reduced by agreement between the Court, the police and the prosecution. A charge of larceny was usually lessened to that of "taking property of another." [1]

Truancy was generally included in the definition of delinquency. although cases involving incorrigible children were heard in the district of Columbia, under special chancery proceedings. More recently, however, on October 8, 1923, it was held by the Court of Appeals of the State that the Juvenile Court had no jurisdiction in truancy cases, and a writ of certiorari was denied by the United States Supreme Court.

The investigators found, that the age limit up to which jurisdiction could be exercised by the Juvenile Court varied much. In California the Courts could deal for all purposes with children under 18. Proceedings in a superior Court involving a person between 18 and 21 might be dropped if it were a case of felony or misdemeanour, and the case dealt with under the Juvenile Court Act. In Minneapolis and Seattle the upper limit of age was 18. In 1923, the Denver and St. Louis Courts were given similar jurisdiction over delinquent children. The laws passed in Colorado in that year not only concern the exclusive jurisdiction of the Denver Court in cases of boys and girls up to 18, but provide for cases touching the adoption, custody, or disposition of persons *under 21 years of age*, and their protection from neglect, cruelty, and abuse. This has been interpreted by the Denver Juvenile Court to mean that it has exclusive jurisdiction, in the first instance, as to *the custody and disposition of* all children under the age of 21 years,[2] but the Supreme Court has pending cases in regard to the interpretation of the law.

Three of the Courts had jurisdiction over violations of child labour law, and in Seattle the issue of employment certificates had been delegated to the judge by the school attendance department. In Columbia the judge had power to issue labour permits to children between the ages of 12 and 14, and 14 to 16. Denver, New Orleans and the District of Columbia had broad jurisdiction over cases of non-support and desertion, and the Denver Court dealt with a number of children involved in divorce cases. In the District of Columbia the Juvenile Court was also endowed with jurisdiction over cases of children born out of wedlock, while the

[1] *Juvenile Courts at Work*, p. 10.

[2] *Ibid.*, p. 11.

Minnesota law includes illegitimate children in the definition of dependency. Many illegitimate children were brought before the Minneapolis Court for the purpose of having guardians appointed, following in this direction recent legislation in Germany[1] and Sweden. The question of making such provision in this country is a matter which might well be explored.

Privacy of Hearings.—Five out of the ten Courts investigated by the United States Children's Bureau possess certain advantages over the English Juvenile Courts, by reason of the fact that they are held in special buildings used for detention homes and probation offices. Liverpool is the only city in this country possessing a Juvenile Court building specially erected for the purpose.[2] Another direction in which the procedure of the majority of Children's Courts here differ from that of many Courts in the United States is in the greater privacy secured in many of the American Courts. Photographs included in *Juvenile Courts at Work* show the informality of the proceedings, only the judge, probation officer, stenographer and delinquent, or judge, probation officer, clerk, parents and delinquent being present.[3] Hearings are sometimes held in the judge's chambers or office.[4] The desirability of the hearing being as informal and as private as possible, and only between the Court, the child and those immediately interested, is stressed also by Mr. Flexner and Mr. Baldwin.[5] They hold, however, that it is important that the method obtaining should " not subject the Court to the criticism of holding star-chamber sessions." " The smaller the court room," said one judge, " the simpler the problem." [6]

An inquiry undertaken recently by the Home Office shows that, out of 876 Courts in different divisions of the country, the number of magistrates present varied from one to ten, three being present in 307 Courts, and four in 217 Courts. In 770 Courts the usual practice is to restrict the attendance of other persons to those interested in the particular case ; but in 114 Courts persons interested in any case were allowed to remain.[7] This is the usual practice in the London Courts.

Five of the ten Courts visited by Miss Lenroot and Miss Lundberg were served by judges devoting full time to juvenile court work.[8] These were Boston, Buffalo, Denver, New Orleans and District of Columbia. In the other cases the judge was one of the judges of the Superior, District or Circuit Court, and gave from two and a half to one and a half days to the work. San Francisco, with the largest Court, had the least amount of time from the judge, although this was supplemented by

[1] *Reichsgesetz für Jugendwohlfarht*, July 9, 1922.
[2] *Report of the Work of the Children's Branch of the Home Office*, July 1925, p. 7.
[3] *Juvenile Courts at Work*, pp. 81, 128.
[4] *Ibid.*, p. 18.
[5] *Ibid.*, p. 54.
[6] *Ibid.*, p. 19.
[7] *Report of Children's Branch*, p. 8.
[8] *Juvenile Courts at Work*, p. 18.

consultations in Chambers and by hearings of girls' cases by the referee. This hearing of girls' cases by women referees is a significant feature in three of the Courts studied. The District of Columbia has a woman judge,[1] and in Los Angeles the woman referee also heard the case of delinquent boys under 13 years. In San Francisco the chairman of the probation committee (a woman), acted as referee in girls' cases. The hearings were taken in a small room at the detention house, the referee and the probation officer in charge of the girls' department being the only officers present. Occasionally the judge sat in difficult cases.[2] Either the woman superintendent of the detention home or a woman probation officer gave help in the hearing of cases in Buffalo, Minneapolis and Seattle.

Probation Officers.—The position occupied by the probation officer in many of the Courts has an important influence on the work, and especially on the use of "informal hearing" of cases. In Denver, the District of Columbia, Los Angeles, San Francisco, Seattle and St. Louis a considerable proportion of cases were adjusted without the filing of a petition or complaint. The investigators found, however, that great variation existed from Court to Court in the types of cases handled and the methods used.[3] The Juvenile Court Law of the State of Washington provided that, in counties having paid probation officers, such officers should, as far as possible, determine, before a petition was filed, whether such petition was reasonably justified.

Whether or not a case became official depended largely upon the attitude of the child at the first interview.[4]

The procedure adopted seems to have much that is worthy of imitation here. Every child was at first interviewed alone, later the parents were called in.

Sometimes, in order to ascertain all the factors in the case, four or five interviews were held with one child, and considerable time was spent with the parents in trying to develop a right attitude on their part. Confidential information revealed by the child was not given to the parents, except with the child's consent.[5]

Another point to be noted in this connexion is that, in cases of neglect, children were excluded from the Court, if the evidence given rendered their presence undesirable.[6] This seems a wise precaution.

The number of delinquency cases dealt with informally ranged from 78 per cent. in Denver and 68·9 per cent. in Seattle, to 43·3 per cent. in San Francisco and 43·1 per cent. in Columbia, or, in other words, 1,770 out of 2,057 Denver cases, and 1,243 out of 2,884 cases in the District of

[1] *Juvenile Courts at Work*, p. 129.
[2] *Ibid.*, p. 129.
[3] *Ibid.*, p. 109.
[4] *Ibid.*, p. 111.
[5] *Ibid.*, p. 112.
[6] *Ibid.*, p. 130.

Columbia.[1] The success of such informal adjustment may be gathered from the fact that, at the time of the inquiry in 1920, no subsequent appearance had followed in 81·1 per cent. of the informal cases at Denver, 71·2 per cent. of those at Seattle, and in 68·5 per cent. of those at San Francisco.[2] These figures were obtained, however, when the jurisdiction of the Denver Court extended in boys' cases only to 16, whereas in Seattle it was 18 and in San Francisco 21.

Comparison of Figures.—This variation in the age of delinquents renders any general comparison with our English figures illusory. But some light is shed upon the American problem by putting side by side the Denver total of 1,609 delinquent boys under 16, who came before the Court in 1920, with the total of children and young persons who, in the London Juvenile Courts, were charged with offences under the Children Act, or whose parents were proceeded against because of the children's non-attendance at school. The figure of 1,609 came from a population of 256,491, while the London figure for 1920 only reached 2,558, out of a population of 4¼ millions.[3] It may be said, in passing, that this figure has diminished progressively during the past five years, and that the total number charged in the Juvenile London Courts during 1924 was 1,814.[4]

Uniformity in Standard.—That much sustained and comprehensive effort was made in most of the cities visited to deal with the problem of child delinquency is clear from the results of the investigation. But it is clear, also, why there is a consistent demand among social workers in the United States for a more uniform standard of juvenile court work. An example of inequality in method may be seen in the provision made for detention. Although six out of the ten Courts studied possessed detention homes, one Court used detention in jail for all children held for short periods. In 1919, 98 children under 12 were held in the jail of this city. An inquiry in 1923 showed that this practice had not been discontinued; some children under 14 were lodged in prison, although generally for a few hours.[5] Even at Boston, in the year ending August 31, 1920, 39 children, for various reasons, were kept in police stations over-night, 17 of whom were under 16 years. At one city the detention home was so seriously overcrowded that boys of 16 were kept in jail in a ward in "a dark, poorly kept basement," where "no washing facilities were visible," and where the boys had absolutely nothing to do.[6] In contrast with this unsatisfactory arrangement was the vast nine-story

[1] *Juvenile Courts at Work*, p. 115.

[2] *Ibid.*, p. 119.

[3] *Annual Report of the London County Council for* 1920, vol. iv, Education, No. 2143, p. 12, Messrs. P. S. King & Sons, 2 & 4 Great Smith Street, Westminster, Price 2*s.* 6*d.*

[4] *Annual Report of the London County Council for* 1924, vol. iv, Education, No. 2388, 1925, p. 14, Messrs. P. S. King & Sons. Price 1*s.*

[5] *Juvenile Courts at Work*, p. 65.

[6] *Ibid.*, p. 67.

building in San Francisco, built specially for the purpose with single rooms for all delinquent children and a practically complete classification. The Boston Juvenile Court used very carefully chosen private homes for purposes of detention. Dr. William Healey, of the Judge Baker Foundation, holds the opinion strongly that this plan is much to be preferred to detention in an institution.

Adequate Study of Each Case.—The importance of the adequate study of each case of delinquency has been urged strongly in the United States for the past decade. Mr. Flexner and Mr. Baldwin, in their book on *Juvenile Courts and Probation*, stated that there were "few Courts where investigations were systematic, uniform and impartial." Although, of the 10 Courts considered, only one had provision for "well rounded study" of all the social, physical and mental factors necessary for full knowledge of the child, eight of the Courts, in their provision for medical and psychological work, go a good deal beyond the arrangements available in the majority of Courts in this country. But they do not secure this expert service for every child.[1] Thus, in the Boston Juvenile Court, out of 869 delinquent children dealt with, only 364 were referred to the Judge Baker Foundation. Out of 1,549 children before the Minneapolis Court, only 469 were examined for physical defects, and a similar proportion in St. Louis and Buffalo.[2] Eight of the Courts made some provision for study of the child's mental condition, in some cases involving exhaustive inquiry at a psychiatric clinic. In five Courts the social, physical and mental findings were considered together. Perhaps the most interesting result of this careful correlation of social and psychological data is to be found in the fact that recommendations as to treatment were made by the social investigator of the case, the chief probation officer or the person undertaking the mental examination.[3]

One of the main difficulties met by the Courts was the inadequacy of the resources at their disposal, more especially in regard to institutional care.[4] The investigators point out that, while in the development of the Juvenile Court great emphasis has been recently placed on diagnosis and scientific study, scientific treatment was now needed in accordance with the psychological factors making for delinquency.

Conditions in English Courts.—A critical and exhaustive study of Juvenile Court standards in this country, on the lines of the American Report, would be helpful to the many social workers who are anxious to see the work of the Courts extended in a number of directions. Possibly the Report of Sir Thomas Molony's Committee may provide eventually such a comprehensive review of the situation. The returns published, however, in the valuable and illuminating Report of the Children's Branch (1925) do enable us to gather much information

[1] *Annual Report of the London County Council*, vol. iv, Public Health, No. 235, 1925, p. 115. Price 2*s.* 6*d.*

[2] *Juvenile Courts at Work*, p. 97.

[3] *Ibid.*, p. 101.

[4] *Ibid.*, pp. 159, 160.

about the present position. Seven out of the nine Juvenile Courts in London function under the Juvenile Courts (Metropolis) Act, the Court being held in a room or building apart from the adult Court and constituted of a magistrate sitting with two justices—a man and a woman. Out of the 876 Courts which made returns to the Home Office, 573 hold the Juvenile Court in the ordinary court, generally before the ordinary sittings. Women magistrates sit invariably in 232 instances, but 236 Courts have no women magistrates on the bench. In 676 cases there is no rule requiring the police to attend in plain clothes. At 811 Courts members of the Press attend, and in 341 instances full details of the cases are given in the local press. Reports on the children's homes are obtained in 404 Courts from the police. Only 203 Courts rely entirely on the probation officer. The school record of the delinquent is obtained always in 303 Courts, but 285 dispense with it altogether. Only 27 Courts make a medical examination an essential preliminary of dealing with the case. In 260 cases no medical examination is asked for at all, and in 462 cases only when it appears necessary. Some 126 Courts state that they have hitherto found it unnecessary.[1]

Only in London are special probation officers employed for children's cases. The use of probation is growing, however, throughout the country. Of the 29,624 children under 16, tried in the Juvenile Courts of England and Wales, 5,812, or a percentage of 16·92 were placed on probation. Fining, however, is almost universal, and it is, perhaps, in this method of treatment that may be seen the difference of principle, underlying the work of the American and the English Courts. Authorities on Juvenile Courts in the United States say that—

> A fine is a penalty, and as such is usually considered to have no place in Juvenile Court procedure.[2]

Further, in only 59 Courts out of 876 in this country are the justices specially designated to hear children's cases.

Provision for detention is equally various. Birmingham is the only city which possesses a remand home, specially built for this purpose—a gift of two public-spirited citizens. In other boroughs buildings have been adapted, houses rented, or accommodation has been set apart on police premises. Workhouses are sometimes used and occasionally voluntary institutions.[3] The numbers for whom provision has to be made is relatively small. At Manchester, the total inmates at two homes, received during 1924, was 118 and the numbers in many of the larger court boroughs range somewhere between 60 and 30.

The fact that the number of children's cases before the Court is not overwhelming does give opportunity for intensive work in every case. Dr. Cyril Burt's recent scientific study of *The Young Delinquent* makes

[1] *Report of Children's Branch*, pp. 8, 9
[2] *Juvenile Courts at Work*, p. 139.
[3] *Report of Children's Branch.*

plain how much sympathy, care and understanding, with medical and psychological knowledge, may be needed, in many instances, to explore the springs of conduct. In so far as institutional treatment may be necessary, this country is fortunate in the possession of a number of excellent schools. School attendance, too, throughout England is well organized, and secures the presence in the schools of 89·3 of the five and three-quarter million of pupils on the rolls.[1] As many as 1,660,471 children were subjected to medical inspection in 1924, and upwards of 911,000 received treatment (excluding dental defects and uncleanliness).[2] There is, therefore, a great chain of effort for child welfare existing throughout the country. If there are weak links in the chain so far as the delinquent child is concerned may we not hope with confidence, that Sir Thomas Molony's Committee will show the way to strengthen the weak links and, if necessary, to forge new ones?

[1] *Statistics of Public Education*, 1925, p. 10. H.M. Stationery Office. Price 7*s*.

[2] *The Health of the School Child, Annual Report of the Chief Medical Officer of the Board of Education*, 1925, p. 151. Price 1*s*. 9*d*.

MODERN EGYPTIAN CRIMINAL LAW.[1]

[*Contributed by* G. Glover Alexander, Esq., LL.M.]

In 1914 Mr. Goadby published Part I of his *Commentary on Egyptian Criminal Law*. The outbreak of the Great War prevented its completion, and the whole work was not published until last year, when it was issued in a complete and enlarged form. As Mr. Goadby says in his *Preface* (dated July 1923) :

> The new edition has, however, a wider range than the earlier one. Many things have changed since 1914. British influence is now dominant in Palestine and Iraq, and the fact has affected the lives of many, among others myself. Transferred to Palestine, I am brought into contact with a body of Penal Law related to but different from that of Egypt, namely, the Ottoman Penal Code which is applied in Palestine as also, though in different forms, in Cyprus and Iraq. This Code, like that of Egypt, is French in character.

He points out that :

> This group of territories, Egypt, Palestine, Cyprus and Iraq, have certain traits in common. The Penal Law of each is fundamentally French, but in each British influence has been present or is now being exercised either in the modification or administration of the law.

With the consent of the Egyptian Government, he has been able to embody in his book references to the Penal Law of Palestine, and to some extent to that of Cyprus and Iraq also. This gives it a wider scope, and entitles the learned author to describe it as " a survey of the Penal Law of those parts of the Near East where British influence is felt (except the Sudan)." It also accounts for the fact that Part I (published in 1914) has been practically rewritten.

He is careful to point out that though the book is published by the Government Press, Cairo (under the ægis of the Ministry of Justice for Egypt), it has no official character and that he himself is solely responsible for the opinions expressed in it.

Primarily the book " is a Commentary on the Native Egyptian

[1] *Commentary on Egyptian Criminal Law and the Related Criminal Law of Palestine, Cyprus and Iraq.* By Frederick M. Goadby, M.A., B.C.L. Sometime Lecturer in the Royal School of Law, Cairo ; Director of Legal Studies to the Government of Palestine. Parts I, II and III. (Cairo : Government Press, 1924. Pp. i–xv, 1–1073.

Penal Code of 1904, and follows its order. All the important articles (of that code) are set out in the text with commentary following." But frequent references are made to the Draft Penal Code of 1915–20, prepared during the war but never adopted. As Mr. Goadby says, somewhat pathetically, of this draft, it " remains derelict " (p. 28). Still, it forms a " model," a sort of ideal, on which Egyptian legislation may proceed in the future, even though it is never adopted as a whole. In this way it may prove useful. Referring to the administration of criminal justice in Egypt, he urges the student who wishes to become acquainted with " the special difficulties arising in the administration of Criminal Law in this country " (Egypt) to " refer to the official reports which are issued from time to time," and adds :

> The subject is one which merits the thought and attention of the educated young Egyptian, and particularly of those who hope to take part in the administration of justice and its improvement in future years (p. 29).

Part I (Vol. I), in which he discusses General Principles, is perhaps the most important part of the work from a scientific point of view. In the Introduction he considers what is the nature of Criminal Law, the difference between Criminal Law and Moral Law or Morality, the Right of the State to Punish, the Purposes of Punishment, Primitive Ideas of Criminal Law and its Modern Tendencies, and particularly modern Egyptian Criminal Law and the Administration of Criminal Law in Egypt, and upon each of these subjects he has something to say that is of value. If there is nothing fresh, he at least puts what he has to say in a fresh setting and gives it a new interest.

What Criminal Law is.—He defines Criminal Law as " that part of the law of a country which relates to the definition and punishment of acts which the State intervenes to suppress." Criminal Law, he says, " is primarily penal." By this he means that " punishment is the dominant feature of the Criminal Law as compared with the Civil Law," the object of which is rather the recovery of damages or reparation. Hence, he points out :

> The line of separation between Civil and Criminal Law has become more and more distinct in modern times. The growth of Criminal Law has coincided with the increase of the power of State.

But while punishment is the primary and dominant feature of Criminal Law, and reparation that of the Civil Law, " it must be remembered that in France and Egypt the Criminal Court has jurisdiction to decide the quantum of civil damages to be granted to the person injured by the criminal act." In order to obtain this measure of redress, however, the claimant (*partie civile*) must join a civil action (*action civile*) with the criminal proceedings. This form of redress, it need hardly be said, is quite unknown to English law. On the contrary, it has been definitely decided in England that a person injured by an act which amounts to a

felony cannot maintain a civil action so long as the wrongdoer has not been prosecuted or a reasonable cause shown for the failure to prosecute him (*Smith and wife* v. *Selwyn* [1914] 3 K.B. 98), though this rule does not apply in the case of a misdemeanour. The reason given for this rule is that otherwise the offence might go unpunished ; the person injured, being satisfied with his damages, might be tempted to overlook the claims of the State to enforce order and protect the rest of the community if that were allowed. It is a confession of weakness on the part of the State, and probably a relic of the times when a conviction for felony involved forfeiture of the felon's goods and chattels to the State. But since the Forfeiture Act of 1870 that is no longer the case, and it is well worth consideration whether some such rule as that which prevails in France and Egypt might not be adopted here, particularly in certain cases, such as seduction and assault on females.

Criminal Law and Moral Law.—Without pausing to consider exactly what is meant by Moral Law, but assuming it to be the same thing as morality, it may be conceded that the Moral Law is wider and broader than Criminal Law. The old distinction of English Law into *mala in se* and *mala prohibita* is not now of much importance ; both classes of cases fall equally within the scope of the Criminal Law. The distinction between a sin, a vice and a crime is a subject of General Jurisprudence. But Mr. Goadby rightly insists on the objective character of Criminal Law as contrasted with morality. As a rule Criminal Law deals only with overt acts. The only exception to this rule in English Criminal Law is the Law of Treason, and even treason must be proved by overt acts. The reasons for this are purely historical. At the same time, it is generally necessary to prove *mens rea*, and in some cases a specific intent. Such a state of mind, however, is mostly inferred from a man's acts. Moreover, he points out that " what is condemned by law tends to be regarded as morally wrong," and mentions, as an instance of this, the suppression of the practice of *suttee* in India. Another instance of this " law of association," as it has been called, between what is morally and criminally wrong, is to be found in the suppression of smuggling. That offence is no longer regarded as venial because of the spice of adventure, as well as profit, that accompanied it. The truth appears to be that as a rule the Criminal Law lags a little behind the moral sense of the community ; but sometimes, and in some respects, it goes in front of it.

The Right (of the State) to Punish.—Under this heading, which has a somewhat peculiar sound to one nurtured on Austinianism, Mr. Goadby observes that " the object of modern criminal law is the repression of acts or omissions which the State regards as injurious to society." In this we venture to think he has struck the true note. The real justification of the power and duty to inflict punishment is " social defence." The State as an organization exists principally for the purpose of protecting its law-abiding members or citizens, and therefore it inflicts pain,

restraint, imprisonment and even death upon its subjects who are guilty of anti-social acts as a deterrent to others who may be inclined to commit such acts. But this is not the only object of the Criminal Law. Early Criminal Law, in winning its way to the approval of the community, has to take account of, and restrain the natural feelings of revenge on the part of the individual wronged.

This feeling of vengeance still lies at the basis of our approval of the punishment inflicted by the Criminal Law (p. 4).

The Purposes of Punishment.—All this leads on to the purposes of punishment, which are not only deterrent, in the sense of putting fear into the minds of intending wrongdoers, and vindicatory in providing a regulated means of satisfying the natural desire for vengeance, but are, or ought to be, preventive and reformative, and this last object, as Mr. Goadby well says :

Tends to become more and more prominent in modern penal arrangements. To prevent crime by reforming the criminal is a noble aim.

Primitive Ideas of Criminal Law.—In dealing with Criminal Law it is no more possible to divorce it from its history than any other department of law, perhaps even less, since it is one of the oldest branches of law, and it is only by slow degrees that first the King and then the State acquired power to enforce their decrees in the best interests of the community at large. Besides the idea of vengeance, there appears in early law the idea of expiation ; the gods as well as man are offended, and also the idea and practice of the blood feud. The idea is that the right of private vengeance can be bought off by a pecuniary payment to the next of kin of a murdered man. Accordingly we find that this right still survives in modern Egyptian Criminal Law.

In applying a European Penal Code in a Moslem country it is clearly necessary to take in account the rights secured by the Moslem Criminal Law. That law contained many traces of the primitive organization of society in which the blood feud was, as among the Bedouin it still is, a living institution. Islam modified the customary law of the Arabs in this matter but did not supersede it. The Dya is the compensation claimed by the heirs of a person killed or by a person who has been mutilated. (Part I, p. 75.)

Other instances can be found in Exodus and in the *Iliad*. It is to be found in the Anglo-Saxon " bôt " ; but the King also claimed a fine or " wite." As the State grew stronger and more centralized, it gradually asserted for itself the sole right of punishing crime ; but the history of trial by battle and appeal of murder (which was not finally abolished in England until 1819) mark stages in the regulation of the right of private vengeance. Thus the idea of Criminal Law was gradually evolved, and

as the State itself was formed so also was developed that institution known as the Criminal Law, which it is one function of the State, and the State alone, to administer, acting in the name and for the protection of the whole community. In spite of our boasted civilization, however, human nature varies little from age to age (though on the whole we hope and believe there is considerable improvement due to the gradual evolution of a law-abiding spirit), and the desire for vengeance still forms an important element in the administration of the Criminal Law, which, if not satisfied, will impair confidence in its administration and result in the injured party " taking the law into his own hands " in the form of vendettas or lynchings. Apparently the time has not yet arrived in Egypt and the Near East generally when the State finds itself in a sufficiently strong position to suppress finally this right of private vengeance, nor can one wonder at this when we consider the conditions of life in modern Egypt with its mixed native population, and its varied types of civilization.

The Modern Tendencies of Criminal Law.—Citing M. Garraud as his authority, Mr. Goadby observes that the characteristics of French criminal administration before the Revolution were cruelty, arbitrariness and inequality of application. In England the state of affairs was somewhat better. Punishments were not arbitrary, though capital punishment was very common and was inflicted for offences that we should now consider trivial; procedure was defective, and the management of prisons was deplorable. Still the burden of proof rested on the Crown, and there was always the intervention and protective power of the jury, and that illogical means of mitigating the severity of the law called " benefit of clergy." It was not, however, till the advent of the Italian reformer Beccaria that attention was called to " the brutality of the existing criminal administration." His work was continued in England by Bentham, and as regards prison reforms by Howard, and on the Continent by many thinkers and humanitarians. All this is set out by Mr. Goadby with many acute and sagacious observations, and it is comforting to record that, in his opinion, " a profound change of attitude has taken place in the course of the last sixty years."

The science of criminology, which is now recognized as a branch of sociology, really began with Lombroso (also, like Beccaria, an Italian), whose *Criminal Man*, published in 1876, and *Female Offender*, published in 1893, laid the foundations of the science. His view that there is a class of " born criminals " is not now received with unanimity, but there is, whatever the causes of its origin, in every country a criminal class at war with society, who have to be kept in order and if possible suppressed. Some of them are of a very low type of intellect, with strongly developed passions which scarcely differentiate them from animals; others are of a higher order of intellect and education who seem deliberately to have adopted a life of crime from love of adventure and moral instability. Alcoholism and epilepsy, want of discipline and disease, heredity and

poverty undoubtedly play a large part in the manufacture of criminals. The causes are very numerous, and as complex as our civilization. In order to study them, it is necessary that these causes should be observed and classified, and the effect of them carefully noted. As Mr. Goadby observes :

> The science of criminology, in the sense of the laws which govern the occurrence of criminal acts, is yet in its infancy. Nevertheless, it is much that crime is now being studied in this scientific spirit.

It is necessary to make a protest here. Many of the persons now engaged in investigating the causes of crime have had little or no connexion with the administration of the Criminal Law and have never been brought into actual contact with it. They have never held a brief in a criminal trial, either for the prosecution or the defence, or sat on the bench in a judicial capacity. They have not known what it is for a near relative to be ruined by a gross system of fraud and forgery and the lives of his children to be embittered. They do not know the difficulties with which the police and magistrates have to deal in keeping the turbulent members of society in order, and consequently they are apt to become doctrinaire and sentimental. Their attention is so much concentrated on the criminal that they overlook his crime and his victims. The other day, in England, there was a pathetic account in most of the daily newspapers of a visit paid to a murderer in the condemned cell by his wife, who brought with her his baby, born since his arrest. But nothing was said about the wife of the man who was brutally murdered and his children (one of whom gave evidence at the trial) who had been deprived of their breadwinner. After all, crime is a very serious thing, and cannot be played with. Society must be protected unless we are to relapse into lawlessness and anarchy. " Rosewater is no good for the plague." The Sword of Justice is as necessary as the Shield of Mercy. Of course, these remarks do not apply in the slightest degree to the distinguished judges and prison officials who took part in the recent International Prisons Congress, but only to the amateurs, and especially to those who dabble in the modern so-called " psychology " of crime.

The economic factor in crime is also an important one. In fact, one writer has defined crime as " an act which the winners, who constitute the ruling power, consider dangerous to their own interest." The criminal, on this view, is a rebel against society and his environment, and the best way of rendering him a good and law-abiding citizen is so to adjust and improve his social environment as to make him feel that he has a better chance in life.

The science of psychology has been brought to bear on the question, and incidentally Mr. Goadby refers with appreciation to Freud and Dr. Hamblin Smith's book on *The Psychology of the Criminal,*

The Question of Punishment.—In dealing with Criminal Law, we constantly recur to this question. As Mr. Goadby well says :

The principal interest of Criminal Law must, however, always centre round the question of punishment. . . . Is punishment effective ? Statistics appear to show that for the most part it is not (p. 20).

But that is no reason (to put it crudely) why the Criminal Law should be abolished. Because a system is only a modified success, and not perfectly successful, that is not to say that it should be condemned. The same objection might be taken against civilization at large, and even against Christianity itself. Nothing is perfect and permanent in this world. We have to make the best use of the institutions we have until it appears that a better system, towards which we are constantly striving, appears possible. It must be confessed that every case of *recidivism*, every second conviction for a similar offence, shows the weakness of the criminal law. The problem of the old offender or habitual criminal appears to be almost insoluble, and the prevention of crime appears to be more difficult than its punishment. Statistics, it is true, show positively the failure of punishment as a complete preventive of crime ; but, from the nature of the case, no statistics show negatively in how many cases the fear of punishment operates to deter from the commission of crime. We still firmly believe that punishment, including some satisfaction to the injured party or his friends (which, for want of a better term, we must call vengeance), is the primary function of the Criminal Law, and that its deterrent effect is much greater than is commonly supposed. As the philosopher Paley long ago pointed out, the certainty of punishment is much more important than its amount.

Crime indeed is a hydra-headed monster, and its causes are as numerous and complex as the elements of society and civilization itself. They vary from country to country and age to age, and are constantly re-appearing in new forms under changed circumstances. Yet we believe that, as the result of the humane and persistent efforts of many devoted men and women, there is on the whole in England, at all events, a decided decline in criminality. Our prisons contain about only half the numbers of prisoners they used to contain, in spite of the growth of the population. The system of putting most first offenders and some other suitable cases upon probation seems to be bearing fruit both economically and morally. Borstal Institutions may not have accomplished all that was prophesied for them, but on the whole it may be claimed that they have been a success. Suppose that such institutions had never existed, and all the young people, of both sexes, who have been sent to them had been sent to prison in the old way, how many confirmed jail-birds and criminals would have been manufactured and periodically turned loose upon society, to say nothing of the cost of their maintenance in prison! We are amongst those who look forward with hope and confidence to the beneficial effects of education, intellectual and moral, better housing and sanitary conditions, better economic conditions, greater temperance in the use of alcoholic liquor, and an increase in the civic spirit, the full

effects of which have not yet been seen. As Mr. Goadby very truly observes :

"The weapons by which crime must be fought are as numerous as its causes," and "all crime is a falling-off from a social idea."

The habits and customs of society change very slowly, and the millennium is not yet. Until then we have to exercise patience and peg away at small reforms, one step at a time. Reformation must begin with the young ; the old are past reform. It is true that the problem of the habitual criminal in our midst, with his innumerable convictions, is a disturbing fact, even to the most optimistic, and sometimes makes us almost despair, or at least believe in the existence of Lombroso's natural criminal man. Yet the truly criminal class is not a large one, and its members are to a certain extent the relics of a past vicious system, and will gradually become extinct. For them there seems to be nothing but the indeterminate sentence which might be determined at the suggestion of a visiting committee of experts with the approval and consent of a wise Home Secretary. In this connexion attention may be directed to the recent International Prisons Congress (the ninth held within a period of fifty years), and the excellent speeches and discussions thereat.

Modern Egyptian Criminal Law.—All this is by way of introduction. We now come to the main subject. As to this Mr. Goadby very properly remarks :

It is, however, advisable to remark that much that may be properly and wisely said as to the origin and nature of crime in Europe cannot, without modification, be applied also to Egypt or Palestine. The wants, the habits of life, and the traditions of the Egyptian peasant are very different from those of the English or French artisan. Crimes of violence prompted by desire for revenge are far less common in England and France than in Egypt. And again :

To the European observer it seems that crime in Egypt is due to absence of self-control much more than is the case in Western Europe (p. 19).

To this may be added the fact of the very mixed character of the population of Egypt (and also Palestine) with its large foreign element, the oriental or semi-oriental temperament of the people, Egypt being the meeting-place of East and West, and the political ferment and changes through which they are passing all of which give rise to special difficulties in the administration of justice in these countries. As Mr. Goadby says :

Murder, again, on the spur of the moment for some quite trifling provocation, as is so common in Egypt, especially in the south, cannot be put down by law.

One cannot forget the assassination of the Sirdar (Sir Lee Stack), and

Dr. Newby Robson. In some "Notes on Egyptian Law," which appeared in this *Journal*, contributed by Sir Malcolm McIlwraith, K.C.,[1] citing the authority of M. Joseph Soudan, the eminent French jurist, comment was made on "the constant and phenomenal increase of crime in Egypt of late years," whatever may be the cause of that increase, and in spite of the influence of French and English assistance in administration. Another very distressing symptom is the manufacture of false charges, which Mr. Goadby describes as "one of the curses of the country" (p. 319); consequently we are not surprised to find that by one of the articles of the Penal Code (No. 255):

> If the sentence (which has been procured by false evidence) is one of death and it has been carried out, the untruthful witness shall be punished by death (p. 609).

In England, perjury is only a misdemeanour, not a capital crime, but many observers are of opinion that the penalties of it ought to be much more strictly enforced.

The comparison between Egypt and England cannot, therefore, be exact. On the question of statistics, indeed, Mr. Goadby observes:

> The figures, however, at least suffice to show that crimes of vengeance such as murder, wounding and malicious injuries to property are far more common in Egypt, while in the case of acquisitive crimes such as theft and the like the difference is less startling. But it is clear that of recent years the latter class of offence also has considerably increased in Egypt.

As to procedure in Egypt, it has already been said that, owing to the dominance of French influence and probably to the prevalence of the French language, which was known to the majority of the foreign residents, and therefore convenient, the basis of the law is French. The Penal Code was promulgated in 1883, and the Code of Penal Procedure was promulgated at the same time. In 1905 Assize Courts were established, and these Courts have an appellate criminal jurisdiction. There are also Mixed Tribunals for foreigners. The result is that many of the distinctions of English Criminal Law are wanting, *e.g.* the division into felonies and misdemeanours which is purely historical and now almost meaningless, and might well be abolished. Instead of this offences are divided in these codes on a logical basis, according to the quantum of punishment or penalty, into (i) crimes, (ii) misdemeanours and (iii) contraventions.

Mr. Goadby's work is, in the main, a commentary on the Egyptian Penal Code and Code of Procedure of 1883, and it is exceedingly well done and instructive. Naturally he is bound by the order of the Code on which he comments. His work is not a treatise on the relative advantages or disadvantages of codification in general, or the best

[1] See *Journ. of Comp. Legis.*, Third Series, vol. v, p. 270.

arrangement of a criminal code, though he cannot of course avoid some reference to that subject. As he says :

> A Penal Code is never an exhaustive statement of the Penal Law.

So long as it remains a working system, there will cluster around the actual language of every code (a code being merely an official statement of the law expressed as clearly and concisely as possible, so as to be easily understood by those who have to obey it) a mass of decisions and explanatory matter, which from time to time will have to be cleared away. These constitute what the French call the *jurisprudence* of the Code. But Mr. Goadby has illustrated, in its highest and best form, the advantages of Comparative Law, and shown the general similarity of several systems of criminal law.

The amount of industry, knowledge and learning that he has devoted to this book is great, and he has produced a work of high, permanent value, which will prove very useful for reference as well as reading. One has only to look at the Bibliography on pp. vii–ix of Part I to see this. He has placed under contribution collections of Legislation, Textbooks and Commentaries not only on Egyptian Law, but on French, Belgian, English, Indian and Turkish Criminal Law, in addition to most of the standard works on Criminology and Penal Science, and the History of Criminal Law.

STREET TRAFFIC LEGISLATION AND REGULATION IN THE UNITED STATES OF AMERICA.

[*Contributed by* WILLIAM PHELPS ENO, ESQ.]

LEGISLATION for the regulation of street traffic is becoming an increasing necessity in all large cities of the world. It has one common object in all countries—to increase to a maximum the traffic-carrying capacity of streets. While the object is simple, the method of attaining this object is one of the greatest difficulty and frequently arouses strenuous opposition. The reason is the number of vested interests in streets which are affected by any proposal for the regulation of traffic. Roads were primarily constructed for purposes of thoroughfare, and the preservation and improvement of passage through them should be the chief end of street traffic regulation. Under modern conditions there are many different classes of traffic whose use of the streets and speed of passage through them differ very materially. It frequently happens that certain classes of traffic—for example, heavy and slow-going traffic—may have to be diverted from certain streets in order to leave these streets free for the passage of fast traffic or of other traffic which must necessarily use the streets in question. This restriction of the liberty of certain classes of traffic in favour of other classes is a fruitful cause of opposition to street traffic legislation. The frontagers on the street must, of course, have the right of reasonable user of the street in front of their premises for the purposes of loading and unloading goods and to conduct other operations in connexion with their premises into which the use of the street enters. It is therefore often necessary to limit the use of the street by frontagers, a proposal which always rouses keen dissatisfaction; indeed, it may be necessary to go so far as to prevent them from using the street for the loading or unloading of heavy or obstructive commodities, except at certain times of the day or night. Both frontagers and the owners or drivers of vehicles under modern requirements may require the use of portions of streets for purposes of "parking" vehicles. Public utility corporations require for telegraph, telephone or electric lines, or gas or water pipes, the use of wayleaves through streets. Hence it is that the regulation of the use of streets involves very delicate discrimination between the conflicting claims of all these competing interests. Under such circumstances it is not surprising that street traffic regulation in all countries rouses the greatest controversy. In spite, however, of that

unfortunate fact, the increased volume of street traffic resulting from the greater number of persons and vehicles using streets brings to the front in every large city the question of street traffic as one of the most important matters calling for legislative regulation.

In the older cities of Europe, especially those of Great Britain, various customs have grown up in connexion with the use of streets which, until recently, formed a sort of working compromise between the conflicting claims to the use of the street. In the United States of America few such customs exist, and street traffic regulation is almost entirely the creature of special legislation, or of municipal or other regulation made under enabling clauses in the City or other Constitution. In New York City there was little legislation or municipal regulation before the year 1900. In 1885 a City Ordinance fixed the maximum speed in the more important streets, and at intervals until 1903 other Ordinances provided for such matters as that vehicles should pass another vehicle on the left side of the vehicle overtaken, that lights should be carried on cabs and on bicycles etc. There was one important street ordinance which gave the right of way on the highway to north- and south-bound vehicles. There was, however, no general code and no single civic authority responsible for the control and regulation of vehicles in the streets of New York City. Indeed, with regard to various matters connected with vehicles provisions of law were to be found scattered in the Penal Code, the Sanitary Code, the New York State laws, the City Charter and the City Ordinances.

It was not until 1903 that any serious attempt was made by comprehensive regulation to apply compulsory rules of control to street traffic in New York City, or, indeed, in any other city of the United States. About that time attention began, for the first time, to be devoted to the subject. It was realized that, although London and the other great cities in England had not any general Code regulating street traffic, apart from some special regulation dealing with particular traffic or particular areas in the Metropolitan Police district of London, in the City of London and in some of the larger provincial cities, yet there were customs which operated for the benefit of the travelling public generally that were enforced by common consent. Many of the powers exercised by the police in the Metropolitan Police district in regard to traffic, were, as the police evidence before the Royal Commission on London Traffic in 1903 stated, exercised without any statutory authority. But in the United States, cities with rapidly increasing street traffic could not wait for the development of customary rules controlling the use of streets such as had grown up in Great Britain. It was felt that the regulation of traffic must be effected by general traffic regulations, short, concise and reasonable, widely distributed and placed in garages, stables, police stations and public places, so that pedestrians and drivers of vehicles could acquire an accurate knowledge of them.

In the United States, an important distinction is drawn between

"general highway traffic regulations" and "special highway traffic regulations." The former are those which are regarded as suitable for the largest city as well as for the smallest village. They are, in fact, the ancient rules of the road, developed to meet modern requirements. Special highway traffic regulations are those regulations which, in addition to the general regulations, are put into statutory force to facilitate and expedite the safe movement of vehicles and pedestrians in thoroughfares of special difficulty or congestion, by expedients such as "traffic officers," "traffic guides," "direction signs," "white lines," "limit lines," "standards," "mushrooms," "turtle backs," "dummy cops," "traffic beacons," "lighthouses," "semaphores," "crow's nests," "traffic regulation lights," "reflecting signals," and other devices.

An active campaign to compel street traffic under force of law to conform to the requirements of modern conditions was begun in New York City in 1900. A short ordinance was prepared and introduced by the President of the Board of Aldermen, but unfortunately before the wrong Committee of the Board. An almost similar ordinance was introduced the next year, before the proper Committee, but was subjected to serious amendment to meet opposing interests. In its amended form it was refused acceptance by the Mayor and Police Commissioner of the City, and a deadlock followed. An examination of the City Charter, however, revealed the fact that the Police Department had sufficient power to regulate traffic without the assistance of the Board of Aldermen. Section 315 of the City Charter reads as follows:

> It is hereby made the duty of the Police Department and Force to regulate the movement of teams and vehicles on the streets, bridges, squares, parks and other public places . . .

The Police Commissioner thereupon adopted in October 1903 the regulations contained in the draft ordinance of 1900. The regulations were printed in small four-page folders for general distribution and displayed on placards in all places where persons using the streets could see them. These regulations, whose efficiency has since been proved by experience, are still in force in New York City, although at intervals minor changes have been made in them.

After the Great War, the question of road and street transit and transport in the United States was investigated by the Council of National Defence, and the Highways Transport Committee of the Council of National Defence proceeded to test and revise these New York City Regulations, with the object of having them applied generally throughout the United States. When the Council of National Defence ceased to exist, this work was, by legislation, transferred to the Bureau of Public Roads of the United States Department of Agriculture. By this department they were referred to the Highway Education Board, which is a semi-official co-ordinating organization on which the Chief of the Bureau of Public Roads is represented.

At a National Conference called in Washington, by the Highway Education Board, in October 1922, the Conference recommended that the Eno Foundation for Highway Traffic Regulation should be invited to take up the investigation of the problem and prepare a Code of general highway traffic regulation in continuation of the work that had been done by the Council of National Defence. That has been done and draft regulations have been formulated, which are as follows :

GENERAL HIGHWAY TRAFFIC REGULATIONS
WITH SAFETY DIRECTIONS FOR PEDESTRIANS

ADOPTED FOR STANDARDIZATION AS A POLICE CODE BY THE COUNCIL OF NATIONAL DEFENCE, MAY 8, 1919, REVISED TO MARCH 15, 1924

Issued with Local Adaptations, 1924, by the Mayor of ——.

DEFINITIONS.

" Highway "—any street or road used as a public thoroughfare.

" Roadway "—that part of a highway or park for the use of vehicles.

" Sidewalk "—that part of a highway or park for the use of pedestrians.

" Crosswalk "—that part of a roadway, marked or understood, upon which pedestrians should cross.

" Prohibited Zone "—that part of a roadway from which pedestrians and vehicles, unless confined to rails, are excluded.

" Safety Zone "—that part of a roadway from which vehicles are excluded.

" Danger Zone "—any part of a roadway not a prohibited zone, a safety zone or a crosswalk.

" Traffic Whirlpool "—any part of a roadway at an intersection or junction of highways where vehicles make turns.

" Curb "—the edge of a roadway, marked or understood.

" Limit Lines "—boundaries of ranking or parking areas, prohibited, safety or danger zones, crosswalks, etc.

" Vehicle "—any conveyance, including a horse. Hand or foot propelled conveyances and skaters are regarded as vehicles when on a roadway, but as pedestrians when on a sidewalk, crosswalk, or safety zone.

" Street Car "—any public service vehicle confined to rails on roadway.

" Live Vehicle "—one whose driver is present, and prepared to move vehicle.

" Dead Vehicle "—one whose driver is absent or unable to move vehicle.

" Horse "—any saddle or harness animal.

" Driver "—any person in control of a vehicle.

" One-way Traffic "—traffic restricted to one direction.

" To Rank "—to stand vehicle (one behind the other) parallel to curb.

" To Park "—to stand vehicles (parallel to one another) at an angle to curb.

TO INSURE SAFETY AND AVOID UNNECESSARY INTERFERENCE WITH ONE ANOTHER, AS WELL AS WITH VEHICLES, PEDESTRIANS MUST OBSERVE THE FOLLOWING DIRECTIONS :

1. *Keep to the right on sidewalk, crosswalk, roadway and passageway (but on highway without sidewalk, keep to left, so as to have clear view of approaching traffic).*

2. *Observe traffic before stepping from curb and keep off roadway except when crossing.*

3. *Cross roadway at a right angle (not diagonally) and if reasonably possible on a crosswalk.*

4. *Keep out of traffic whirlpools.*

5. *Watch for traffic officer's signal and heed traffic signs and limit lines.*

6. *Stand on sidewalk or within safety zone while waiting for a street car or bus.*

7. *Face and step towards front of street car when alighting.*

8. *When necessary to pass behind a street car or other vehicle, watch out for traffic.*

9. *On alighting from a street car or other vehicle, observe traffic before moving.*

10. *Enter and leave a car-stop safety zone at crosswalk only.*

11. *Do not stand in the middle of a sidewalk but on one side and out of the way of other persons.*

12. *Do not loiter on a crosswalk or before a public entrance.*

13. *When sidewalks are narrow use the one on the right.*

14. *Do not walk more than two abreast on a crosswalk or congested sidewalk nor more than three abreast on any part of any highway.*

15. *Hand or foot propelled conveyances and skaters WHEN ON ROADWAY must observe regulations for VEHICLES; but when on SAFETY ZONE, SIDEWALK OR CROSSING ON CROSSWALK, they must observe directions for PEDESTRIANS.*

The following Regulations for vehicles (including street cars in so far as their being on rails will permit) shall be observed by their drivers *who shall* promptly comply *with all police orders given by voice, hand or whistle, semaphore or signal light, as to starting, stopping, slowing, approaching or departing from any place, the manner of taking up or setting down passengers and the loading or unloading of anything.*

Vehicular or pedestrian traffic may be halted or diverted by the police to avoid congestion or to promote safety and convenience.

ARTICLE I. RECKLESS DRIVING IS UNLAWFUL AND INCLUDES:

SECTION 1. Driving any vehicle when not legally qualified to do so, or when intoxicated, or when for any other reason not competent to drive properly.

SEC. 2. Driving any vehicle when it is not under practical control, *especially at crosswalks and roadway intersections or junctions.*

SEC. 3. Failing to exercise due care in crossing or entering the traffic of another roadway—*bearing in mind that it is obligatory not to interrupt the traffic of the more important thoroughfare unnecessarily.*

SEC. 4. Exceeding a reasonable, considerate and safe speed rate under existing conditions or the speed rate established by law.

SEC. 5. Violating any of the following Regulations so as to cause danger or failing to take every reasonable precaution for safety or to obey any order of a traffic officer or any direction indicated by official traffic sign, semaphore, signal light or limit line.

ARTICLE II. PASSING, TURNING AND KEEPING NEAR CURB.

SECTION 1. A vehicle passing or being passed by another shall not occupy more than its fair share of the roadway.

SEC. 2. A vehicle meeting another shall pass to the right.

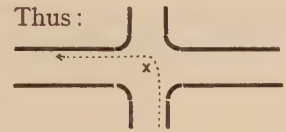
SEC. 3. A vehicle overtaking another shall pass to the left, but must not interfere with traffic from the opposite direction, nor pull over to the right before entirely clear of the overtaken vehicle—but in overtaking a street car, pass to the right, except in an emergency pass to the left, with due caution after observing traffic from opposite direction.

SEC. 4. A vehicle turning into a roadway to the right shall keep close to the right-hand curb.

Thus:

SEC. 5. A vehicle turning into a roadway to the left shall pass around the central point of intersection of the two roadways.

Thus:



except on a roadway sufficiently wide and where there is no safety zone in the way a vehicle may draw into the centre of the roadway back of cross-walk (if a traffic officer is present, wait for his signal before turning) and then pass in front of the central point of intersection,

Thus:

SEC. 6. A slow moving vehicle shall keep as near as practicable to the right-hand curb—*the slower the speed the nearer the curb.*

SEC. 7. A vehicle loitering or cruising for fares shall proceed fast enough not to impede following traffic.

SEC. 8. A vehicle on a roadway divided longitudinally by a parkway, walk, sunkenway, viaduct, safety zone, or cab stand, shall keep to the right of such division.

SEC. 9. A vehicle passing around a circle, oval or other form of centralized obstruction, shall keep to the right of such obstruction.

ARTICLE III. RANKING, PARKING, STOPPING, FOLLOWING, BACKING.

SECTION 1. A live or a dead vehicle may be ranked or parked on any roadway and for any length of time, provided it does not interfere with the rights of others, and subject to the following sections of this Article, unless prohibited from so doing or limited as to time by an official traffic sign or special regulation.

SEC. 2. A dead vehicle shall not be left on a congested roadway during crowded hours except on an indicated public ranking or parking space, subject to local police traffic signs, nor shall it be left in such a position as to

prevent other ranked or parked vehicles from moving away nor so as to obstruct moving traffic.

SEC. 3. A vehicle stopped in front of an entrance to a building or transportation station, unless it be expeditiously loading or unloading, shall promptly give place to an arriving vehicle.

SEC. 4. A vehicle shall not be stopped on a crosswalk, nor within an intersection, nor within ten feet of a fire hydrant, except in an emergency, nor with any part of its load extending beyond limit lines.

SEC. 5. A vehicle on a two-way traffic roadway shall stop at the right hand curb only, but not at all if preventing other vehicles from passing in both directions at the same time.

SEC. 6. A vehicle on a one-way traffic roadway may stop at either curb, but not at all if preventing other vehicles from passing in one direction.

SEC. 7. A four-wheeled, horse-drawn vehicle backed up to the curb shall have its horses stand parallel to the curb, faced with the direction of traffic.

SEC. 8. A vehicle shall not follow another too closely for safety, nor fire apparatus, going to a fire, closer than 500 feet.

SEC. 9. A street car shall not be stopped nearer to another street car ahead than 5 feet.

SEC. 10. A vehicle shall not back to make a turn or in any way to occupy a roadway as to obstruct traffic.

ARTICLE IV. OVERTAKING STREET CARS.

A vehicle overtaking a street car, stopped or stopping to take up or set down passengers, shall stop or pass very slowly, carefully and considerately, not approaching said car nearer than 8 feet (the width of a street car).

ARTICLE V. RIGHT OF WAY FOR CERTAIN VEHICLES.

SECTION 1. A vehicle shall give the right of way to any other vehicle approaching from its right and to all vehicles of the police, water and health departments, public service emergency repair vehicles and ambulances approaching from any direction, *but this shall not relieve any approaching vehicle from consequences of carelessness* (see Article I, Sections 2, 3 and 4).

SEC. 2. A vehicle, on the approach of fire apparatus, shall move out of its way or stop so as not to interfere with its passage.

SEC. 3. A vehicle in front of a street car, upon signal, shall immediately get off the track.

ARTICLE VI. SIGNALS.

SECTION 1. Drivers must signal by hand or by some other effective method before starting, slowing, stopping or backing, and before turning, *especially to the left.*

SEC. 2. Drivers when approaching or entering a curve, highway intersection or junction or coming to the top of a hill, *if roadway is obscured,* must use sound signal effectively and go slow.

SEC. 3. Drivers when crossing a crosswalk must go slow, take care, and signal when necessary to insure safety.

Sec. 4. Police whistle signals mean:
One Blast—that approaching traffic shall stop behind crosswalks.
Two Blasts—that halted traffic shall proceed *with due care for pedestrians.*
Three or more Blasts—approach of fire apparatus or other danger.

Sec. 5. Vehicles must be equipped with lights, mirrors and sound signals as prescribed by law, but sound signals shall not be used except for necessary traffic warning. *A moderate speed will reduce need for noisy signals.*

Article VII. Restrictions in regard to Vehicles.

Section 1. A vehicle shall not be used when it is so constructed, enclosed, equipped or loaded as to be dangerous, or noisy, to scatter its contents, retard traffic, or prevent the driver from having a view sufficient for safety; or when it is so loaded with iron or other material as to create loud noises while in transit, or when it is loaded with any material extending beyond its rear without being provided with a red flag by day and a red light at night on the rear end of the load.

Sec. 2. A vehicle unless confined to rails shall not tow more than one other vehicle without authorization by law or official permit, and the tow connexion snall not be more than sixteen feet in length, and shall have a white flag attached to its centre.

Sec. 3. A dead vehicle shall not be left in such a condition as to prevent its being moved out of the way in case of emergency, and if motor propelled it shall have its motor stopped and effectively secured against being started, its emergency brake set, and, if on a hill, its front wheels turned in the direction of the curb.

Sec. 4. A vehicle intended for commercial purposes shall not be driven by anyone less than sixteen years of age.

Sec. 5. No one shall hitch or hold on to any vehicle.

Sec. 6. No one shall ride upon the rear of a vehicle without the driver's consent.

Sec. 7. Coasting is prohibited where dangerous.

Sec. 8. Opening a motor muffler cut-out on a highway within a city or village, or in the country within 500 feet of a dwelling, school, church or hospital is prohibited.

Sec. 9. Dense smoke from motors is prohibited.

Article VIII. Control, Treatment and Condition of Horses.

Section 1. A horse shall not be unbridled nor left unattended on a highway or in an unenclosed area, without being safely fastened, unless harnessed to a vehicle with wheels so secured as to prevent the horse from moving faster than a walk.

Sec. 2. No one shall ride, drive or lead a horse on a slippery pavement, unless the horse is properly shod to prevent falling; over-load, over-drive, over-ride, ill-treat or unnecessarily whip any horse; crack or so use a whip as to excite any other person's horse, or so as to annoy, interfere with or endanger any person; or use a horse unless fit for its work, free from lameness or sores likely to cause pain, and without any vice or disease likely to cause accident, injury or infection.

Sec. 3. A led or ridden horse should be approached slowly and with extra care and consideration, particularly by motor vehicles.

These draft regulations are the model of all general highway traffic regulations made in the United States.

In a large number of municipal and other districts, general highway traffic regulations have been made by the appropriate authority, all founded upon this Code. In some cases, however, unnecessary amendments have been introduced with the effect that the general highway traffic regulations are not uniform throughout the United States, thus the prime object which the Council of National Defence had in view is defeated. Nothing is more important in regard to traffic than that the regulations throughout any country should be uniform and only such additions or alterations introduced into the standard model as are necessary to deal with special difficulties in particular localities.

As has been mentioned above, traffic regulations in the United States are "general" or "special." Under the special regulations which have been made in many cities and which are strictly enforced, much has been successfully achieved in improving passage through the more congested streets by the scientific use of white lines, dummy cops, semaphores, traffic mushrooms, etc., the working of which would take too long to explain in the present article, but which is well-known to the users of streets in the City of New York.

One particular special traffic regulation in New York City has been the cause of much dissatisfaction. Fifth Avenue is intersected by many streets. The three most important cross streets are 34th, 42nd and 57th Streets, which are wider than the other cross streets and carry much more traffic. By a system of synchronized traffic signals on Fifth Avenue, all traffic on the Avenue is stopped from time to time to allow the traffic of the intersecting streets to cross Fifth Avenue. At other times, the traffic in the intersecting streets is stopped in order to allow the traffic on Fifth Avenue to proceed. The length of the stoppage is the same right along Fifth Avenue. This period must be of sufficient length to allow the traffic on the most important intersecting streets like 34th, 42nd and 57th streets to cross and clear Fifth Avenue. The interval necessary for those streets is obviously too long for other cross streets of less importance and carrying less traffic. The result is uneven distribution of vehicles on the roadways and the loss of much valuable street space. It is probable that this particular special traffic regulation will ultimately be abandoned in New York City, although the experience gained by its being put into operation has been most valuable.

Another special traffic regulation in many cities is the enforcement of a rotatory movement of traffic round a junction of several important streets. The object is to prevent traffic in some of the intersecting streets being held up in order to allow the traffic in the other intersecting streets to proceed. All the intersecting traffic is kept in constant circulation; as it comes out of one street it circulates round, keeping to its proper side, until it comes to the street down which it wishes to continue. This system was first tried under special traffic regulation at Columbus

Circle in New York in 1905. It was in 1907, then put into operation at the Place de l'Étoile in Paris and continued till the war. It is a system now almost universally adopted where it is attempted to regulate traffic desirous of crossing circular areas. It will work equally as well at simple right-angle intersections where it is possible to describe a circle of 75 feet or more in diameter within the corners of the streets.

Another common special traffic regulation is the " Express Street," or " Boulevard Stop System." Under this system, an arterial highway is selected, and the speed of traffic on the arterial road is increased by allowing it the right of way over all cross street traffic. The latter is compelled to come to a complete stop before entering the boulevard, either to weave into traffic or to cross it.

In the United States a number of experiments are being tried by means of special traffic regulations of varying character, to deal with what is called in Great Britain " the parking " of vehicles, but what really is more accurately described as the " storage of dead vehicles on roadways." It is a most controversial subject, full of difficulties, and experience has not yet given sufficient knowledge to enable it to be stated that one uniform system can with advantage be put into operation by special traffic regulation in all great cities.

Experience in the United States does go, however, to show that certain special traffic regulations are inefficient for their purpose; for example, those providing for lights as part of a synchronized block system to regulate the traffic on the main street and the streets which cross it; also those providing for the elimination of the left-hand turn, and for the adoption of one-way traffic in streets too wide for the purpose. One fault is the tendency of most special traffic regulations to go too much into detail. It is essential if they are to be carried out in practice, that they should be simple, short and easily understood.

Taking the United States as a whole, the first need to-day is for standardization of the general highway traffic regulations and as far as possible uniformity under similar circumstances of all special regulations. Next the adoption of some uniform national principles on which special traffic regulations can be founded, providing for " parking " or " storage of dead vehicles on roadways." It is becoming evident that the rôle of the police should be limited to the performance of executive duties—for example, directing, controlling and facilitating the movement of traffic. The scientific work of drawing up a technical system on which traffic should be regulated is a matter, not for the police, but for highly trained highway engineers. Street Traffic Regulation has now been made a branch of Civil Engineering in the United States. Six Universities are providing elaborate courses of instruction, and soon an ample supply of Civil Engineers trained in the highly technical science of street traffic regulation will be available.

NOTES.

The Law Quarterly Review.—The death of the learned Editor of *The Law Quarterly Review*, Mr. A. E. Randall, reduces still further the number of literary men at the Bar who take an interest in the theory of law or possess any knowledge of continental systems of law. His task, as an editor, was a comparatively easy one, since the reputation of *The Law Quarterly* had been so well established by its founder, Sir Frederick Pollock, though it was no small matter to have maintained its traditions for sound learning and critical acumen. The proprietors are to be congratulated on having secured, as his successor after a short interregnum, during which its former Chief is again acting, Mr. A. L. Goodhart, of Corpus Christi College, Cambridge, now chief Editor of *The Cambridge Law Journal.*

The Movement for International Assimilation of Private Law.—Mr. Wigmore, the Dean of the Law School, Northwestern University, U.S.A., has contributed to the *Illinois Law Review* an interesting and suggestive article on two new organizations for promoting the unification of private international law, as opposed to public international law.

The unification of the laws of the divers nations of the earth has long been a legal dream. *Non erit lex alia Romæ, alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit.* But not much progress in that direction has been made since Cicero uttered his eloquent prophecy. A universal language would be a useful preliminary to the universal code, but there again, in spite of Esperanto, the project seems to hang fire. In the present state of the world, any extensive scheme of unification is neither possible nor desirable. A nation's laws, even more than a nation's clothes, are the outcome of its history and environment Clothes suitable for the Esquimaux are not suitable for the natives of Nigeria, and a compromise which made Oxford trousers the universal garment would not be very acceptable. There are, no doubt, a good many isolated points on which uniformity is desirable. An Englishwoman who marries an American citizen loses her British nationality, but does not thereby acquire American nationality. Again, there are a good many people floating about who have lost their nationality of origin, but have not acquired any new citizenship. What is the status of an Englishwoman who has married one of these denationalized persons? Questions of this kind might usefully be settled by international agreement.

Mr. Wigmore reviews two new organizations which have been started on the Continent to further the unification of private law. The first organization is the International Academy of Comparative Law founded at Geneva in September 1924, with thirty members. The Academy is to consist of persons appointed by selection, "who hold or have held a university chair, or who are or have been authors of works" on comparative law. The objects of the Academy are (1) to promote the study of comparative law, and (2) to improve legislation in private law by, *inter alia*, preparing a code of commercial law, and conflict of laws. Mr. Wigmore is sceptical as to the results which will be attained by the Academy. He points out that there are other well-established societies dealing with the conflict of laws. Further, the Academy has no money and no library. "Uniform laws are not codified by a few lawyers getting together. Vast forces are interested in commerce, and the rules of commercial law are rooted in the customs and interests of commerce. The men that must also be brought into the bargain are the bankers, the insurers, the brokers, the shipowners, the exporters, the manufacturers, the foreign offices of government, the legislators and so on." The second society is the International Institute for the Unification of Private Law. It was founded in September 1924 by the Italian Government, who propose to endow it with an annual grant of 1,000,000 lire. It is to have its home in Rome, and is to act under the directions of the League of Nations. The aims of the Institute are to "unify, harmonize and co-ordinate private law between States and groups of States, regard being had to the work of the Committee on Intellectual Co-operation, and to the technical organizations of the League of Nations." The governing body is to consist of a President, and ten members, appointed by the League of Nations, and a Secretary-General appointed by the Italian Government. Adhering nations may send representatives to the Institute "selected from among persons learned in the law. The General Assembly, when the governing body thinks it desirable, is to be convened to consider drafts and proposals for submission to the League of Nations."

Mr. Wigmore regards the Institute as a more hopeful experiment than the Geneva Academy, and apparently desires the United States to take a hand in the proceedings. "If for example, the bankers of the United States wake up to find that a uniform code of negotiable instruments has been worked out by the International Institute, and has been adopted by the home governments of all the 54 States in the League of Nations, and then discover that all their transactions with London, Buenos Ayres and Tokio are being regulated by a law which at important points clashes with American law, they will then realize, to their cost, that our Government will have made a mistake in staying out of the Institute, simply because the Institute is tainted by a connexion with the League of Nations." Judging by my own experience at the Hague Conferences of 1910 and 1912, Mr. Wigmore's fears may be groundless. A uniform

draft law relating to bills of exchange and promissory notes was approved by the official delegates of 33 nations out of 36 nations, which were represented at the Conferences. But, as far as I know, not a single nation has enacted the agreed draft. England and America stood aloof from the project. They explained that, barring two or three anomalies in their laws, there was a practically uniform system throughout the English-speaking world. That system was founded on mercantile custom and experience, and they were not willing to change it. They were prepared to explain its principles, and, though they could not adhere to the proposed draft, they agreed that it would be most desirable that instead of the present multiplicity of laws, there should in future be only two systems, namely, the Anglo-American and the Continental. They hoped that, as time went on, the two systems might approach nearer to each other.

If there are difficulties in agreeing on a uniform law of negotiable instruments, where there is a general similarity in the laws of all commercial nations, those difficulties are much increased in the case of civil law. For instance, the wine and beer producing countries would scarcely welcome a uniform Prohibition law. Again, it is not easy to get the right people together to frame the draft laws. The persons who attend commercial conferences may be divided into three classes, namely, jurists, practising lawyers and men of business. The jurist takes broad, general views of the subject, usually untrammelled by practical experience. The practising lawyer takes a somewhat one-sided view, because he sees only the pathology of commerce, and not its healthy physiological action. The business man wears the shoes, and knows where they pinch, but the first-rate business man cannot spare the time to attend conferences in Rome or elsewhere. Moreover, the different classes of business men hear of the conflicting interests. A rule which may suit a marine underwriter may not be acceptable to the shipper or the shipowner, and shippers and the shipowner have not identical views on many points. If the League of Nations, on the initiation of the Italian Institute, proceeds to prepare draft laws, it is to be hoped that it will not try to embody them in treaties, so that they must be either accepted as they stand, or rejected. The United States Commission on Uniform State Laws adopted an eminently sensible procedure. They drew up, among others, a draft negotiable Instruments Law; but every State in the Union was left free to enact it for its own territory either wholly or in part, or subject to any modifications that local circumstances might require. The draft was a success, and has now been enacted, with a few modifications, by more than 40 States and Territories of the Union.

M. D. CHALMERS.

Judicial Remedies in France for the Enforcement of Industrial Agreements.—Collective agreements between associations of employers and trade unions are the basis of modern industrial organization. Yet it is true to say that it is only quite recently that the legislatures of even

the most progressive countries have given any attention to making them valid and enforceable. In Great Britain the subject has never yet been authoritatively considered. On the other hand, on the Continent of Europe many industrial agreements are enforceable at law, in some countries by and against the parties to the agreement, in others, by and against the individual members of the associations of the contracting parties. Indeed in some cases the agreements, if made by parties who are thoroughly representative of the industry affected by the agreement, may be enforced against employers and workers in the industry who are not members of the contracting associations. The position of such agreements in France is very interesting and is lucidly described by Professor Paul Pic of Lyons University, who is a recognized authority on French industrial legislation, in the number for July 1925 of the *International Labour Review*, published by the International Labour Office of Geneva. This article is well worth careful study.

A marked feature of recent French legislation has been the strengthening of the hands of industrial associations. The law of 1864, which legalized combination of workers, was followed up by an Act of 1884, which allowed "blacklisting" if not accompanied by acts of violence. Acts of 1919 and 1920 contained regulations for collective labour agreements between employers and workers and laid down the right of duly constituted associations to institute legal proceedings for breach of these agreements. This was a legal reform of prime industrial importance. Even before the passing of the two latter Acts both judicial theory and practice in France had agreed in accepting the validity of collective agreements, and recognized the right of associations party to them to institute proceedings for their breach. There was, however, substantial difference of opinion in various Courts as to whether such associations were entitled to take any action if the "injury" complained of were not actually suffered by the association. Different Courts took different views as to what "injuries" were or were not actionable. Since the Acts of 1919 and 1920, however, both the Courts and legal textbook writers in France have consistently upheld the full validity of all industrial agreements, whether between individual employers and their workers, or trade unions representing them, or between associations of employers and trade unions. In application of the principles of the Acts of 1919 and 1920 it has been held that, when employers and workers have concluded a collective agreement fixing conditions of work, its clauses remain valid for the whole period of the agreement—hence, if maximum wage rates have been fixed, the employers' organization is justified in opposing any pressure by the unions to increase the rates. The employers in such a case may decide not to employ any workers during a specified period without violating "the principle of the liberty of labour," if the purpose is *bona-fide* to secure maintenance of agreed wage rates and not to weaken a trade union. The deciding of whether a legitimate or illegitimate motive lies behind a decision of this kind, calls

for great discrimination on the part of the Court. In order to deal with any covert action on the part of employers to weaken trade unions, by refusing to employ men who belong to a union, a bill was introduced this year, in the Chamber of Deputies, making it a penal offence to attempt to " victimize " unions in this way. A general and temporary refusal to continue to employ or to engage any worker, whether unionist or non-unionist, is, however, merely a form of " lock-out," and in the absence of any agreement prohibiting it is as legitimate as a strike.

The limits within which a trade or industrial association may institute proceedings founded on an industrial agreement vary considerably, according to whether its action is based on an ordinary agreement between its own members, *e.g.* a " cartel " agreement, or a collective labour agreement between members of rival associations, *e.g.* an agreement between a trade union and an employers' association. It is necessary, therefore, to distinguish clearly between the two classes of agreement. Under the Act of 1884, as amended by the Act of 1920, an association could only institute proceedings in the collective and not in the individual interests of its members. The Act of 1919 gave them also the right to take the place of any of their members in personal actions brought by them under such agreements, without even the necessity of obtaining a special mandate from the members concerned. In these cases the association is regarded as merely the representative of the member for whom it is acting, and proceedings cannot, of course, go on if that member in any way surrenders his rights to institute an action, as, for instance, by negotiating with the employer for temporary suspension, so far as he is concerned, of the collective agreement.

The validity of individual agreements, which are not in accordance with the terms of a collective agreement, was universally admitted before the 1919 Act, but it would be more strictly in accordance with the spirit of the French law if these individual agreements were considered irregular, unless they were preceded by notice of withdrawal from the collective agreement.

There are two main points on which the French Trade Union Law, at least since 1906, differs entirely from the English. In the first place, the French Law formally prohibits any direct political action on the part of trade unions, whilst the British Law recognizes the right of the unions to further political objects, merely insisting that the political funds should be kept apart from the trade union funds proper. The other fundamental point on which the Trade Union Law differs in the two countries is that, in France, a strike which is instituted by a trade union to enforce increased wages in breach of a collective wage agreement between the employers' association and the union is regarded as a breach of contract, and renders the union liable to proceedings. In England, on the other hand, although the view of the civil liability of the trade unions was adopted after the Taff Vale case, the Trade Disputes Act

of 1906 prohibited any proceedings being taken against trade unions merely for acts done in contemplation or furtherance of a trade dispute. Consequently, an English trade union which initiates a strike, even contrary to the provisions of a collective agreement, is not liable to legal proceedings and its funds are protected against any action brought by employers injured by the strike.

The recent rulings of the French Courts in connexion with collective agreements may be illustrated by two concrete decisions, dealing with an alleged breach of a collective agreement, by an employer and a trade union respectively.

The first case is that of the St. Nazaire Metal Workers' Union and the Loire Workshops and Shipyards. The Joint Departmental Committee for Loire-Inférieure, representing employers and workers, drew up and agreed to a scale of maximum wage rates combined with a table of cost-of-living bonuses, which were to form a single scale of remuneration. It was to remain in force for one year, and thereafter to be terminable by one month's notice by either side.

Shortly after the commencement of the agreement, the United Shipping Company, for whom the Loire Shipyards had just finished three steamships, cancelled their order for a fourth. At the urgent request of the Loire Shipyards, they reconsidered their decision and agreed to allow the fourth to be proceeded with, on condition that they would not, in respect of that ship, be obliged to pay the cost-of-living bonus. At first the workers refused to comply with this condition, but a majority ultimately agreed to non-payment by the shipyard company of the bonus. The trade union, however, and a few dissentient workers, refused to abide by the decision of the majority and the secretary of the union sued the shipyard company for heavy damages on the ground that the company had broken the collective agreement. Although the union was not entitled to act in the name of its members, as a majority of them had submitted to a variation of the agreement, the Court agreed that it was entitled to bring an action in its own name, and on its own account both as a party to the collective agreement, and a defender of the interests of the trade it represented. The company pleaded that the union had no cause for action, but the Court held that it was the concern of a trade union to prevent an employer evading his obligation by irregular means, and that, apart from its members, there was a breach of contract with the union, which had inflicted an injury on the union that entitled it to compensation.

The second case is that of the Mulhouse Contractors' Association and the Building Workers' Union, in which the trade union was responsible for the breach of contract. In this case the union declared a strike before the expiration of the agreement, and though they claimed in defence that the strike had only been declared in consequence of a previous breach of the agreement on the part of the employers' association, this could not be proved and they were held liable on the ground that

the employers' association, being a party to the agreement, were entitled to have it enforced.

These two cases are illustrations of the endeavour of the French Courts to enforce the observance of collective labour agreements, by all trade organizations, whether composed of employers or employed.

LYNDEN MACASSEY.

Proportional Representation.—*The American Political Science Review* for August 1925 contains a valuable article by Professor Nils Herlitz of the University of Stockholm, explaining the system of proportional representation in force in Sweden, and giving a balanced judgment on its results. Professor Herlitz considers ill-founded the allegation, often made in Sweden, that proportional representation has "strengthened the influence of parties and weakened that of personalities." Indeed, that such a charge should have been made comes as a surprise to English supporters of proportional representation; in this country the charge made is precisely the opposite. It can hardly be doubted that Professor Herlitz is right when he attributes the strengthening of party ties in Sweden, since 1907, to "democratization" rather than to the electoral system.

Professor Herlitz takes the view that proportional representation has rather promoted the growth of several parties, though he states that "large national parties are an unknown element in Sweden and have no root in Swedish tradition"—a tradition based on the separate representation of classes which prevailed in the old Riksdag till 1865—and, passing outside Sweden, he observes with truth that "even in the countries of its origin, the two-party system has now developed a tendency to split up."

The general conclusion of the article is that:

> Proportional representation is still too new in Sweden for one to pass sure judgment on its working and on its prospects for the future. As has been shown, there are various elements that are always critical of it. In spite of criticisms of the manner in which the principles have been applied, and in spite of observations with respect to the serious consequences in important districts, there is no doubt that the people in general are fairly well satisfied with the system itself. No party advocates a return to the majority system; and the best proof that proportional representation is sound is in the fact that its fundamental principle (complete justice to all parties), accords so well with Swedish political traditions.

One further remark: a study of the article suggests that the problem of government—the problem, that is, of the enforcement by State action of the general will of the community in whatever may, for the time, be considered the proper limits of that action—needs a more radical discussion than it has hitherto received. Given an educated democracy, such as is now developing, with no slave labour, how is it to achieve

"self-determination"? Are we to seek to force it into one or other of two moulds, or are we to perfect its methods of self-expression, and accept the fact that this self-expression will involve a new technique of parliamentary and representative government?

J. Fischer Williams.

The Personality of an Idol.—Students of the evolution of religion, no less than jurists, are grateful to the Judicial Committee for its masterly pronouncement, of April 28, on the true nature of Hindu idols in the case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick and another*. From the juristic point of view, the merits of the Committee have been misapprehended in some quarters; it is not an instance of the application of Western judicial thought to Eastern religions, nor does it prove the pervasive and elastic character of the English common law. Few things, in point of fact, have done more harm in Indian legal history than the effort to apply principles of the common law beyond their sphere, as in the famous instance of the permanent settlement of Bengal. The true ground on which the Committee deserves appreciation is the power which it has shown to carry out to their logical conclusion principles of Hindu law itself, a system which, in complexity and subtlety, often puzzles the keenest judicial intellect.

The relevant facts in the case at issue were really simple enough. Some years before his death, in 1846, a wealthy Hindu of Calcutta had consecrated and established in a private chapel in his dwelling-house an idol of his family deity, Radha Shamsunderji, and in his will, which included the idol in the enumeration of his property, he provided an endowment for the upkeep of the family worship and entrusted the carrying out of the ceremonials to his widow until his adopted son reached the age of twenty, when he in turn was to undertake the task. This son, Jadulal, took, in 1881, an important step, for he substituted, for the family dwelling with its chapel, two distinct houses, between which a chapel was erected with a private entrance from either house. Seven years later he executed a trust deed, in which he provided specifically for the allocation of certain premises in the chapel for the use of this and other family idols, and expressly forbade the removal of the idol from the appointed place unless provision were made for the supply of other quarters at least equivalent. In 1891 Jadulal's mother died, leaving by will a large endowment for the maintenance of the worship of the idol of Radha Shamsunderji, and Jadulal himself died in 1894. His estates were large, and, after an arbitration, it was decided that his three sons were entitled to equal shares of the residue; as there were only two houses, one was allotted to each of two of the brothers, while the third was given funds to acquire a third house for himself; the chapel was declared to be joint property and the duties of worship were to be carried out in rotation by the brothers. A similar arrangement was also made

regarding the performance of worship under the terms of Jadulal's mother's will.

The second son set up, in 1910–11, the separate establishment contemplated, and both in 1911 and 1914, when his turn of caring for the idol came round, it was removed from the original chapel and conveyed to his house, where due reverence was paid to it. In 1917, however, exception was taken to this proceeding by Pradyumna Kumar, who had by that time attained his majority, and who held that the terms of Jadulal's trust deed of 1888 precluded the removal of the idol from its original abode. Hence litigation, resulting in a decree of the High Court in Calcutta in 1922, which was reversed in the following year by the same Court on appeal, while both decisions have now been set aside by the Judicial Committee, on the ground that the Court below had failed to give full effect to the implications of the true doctrine of the nature and character of a Hindu idol.

The case for the respondent in the appeal at one time rested on the seemingly common-sense view that an idol was a chattel, which his adoptive father had bequeathed to Jadulal, and that the latter had full power over it; counsel, indeed, before the High Court went so far, when pressed, as to hold that Jadulal might have thrown it into the river without breach of obligation. On this view, the deed of 1888 meant exactly what it said, and it sufficed to locate absolutely the idol, without power of removal for periodic worship elsewhere. The contention was not so irreverent as it might seem. The Veda, Indian belief asserts, is the source of all law, and the Rig-Veda itself (iv. 24, 10), presents us with the appeal of a seer to the public to hire his idol: "Who," he asks, "will pay ten cows for my Indra? When he has slain with his aid his foe, let him restore him to me." Here we have the highest authority for the conception of an idol as a piece of merchandise, and Jadulal therefore might be excused if he had held himself entitled to treat the image of his god as an heirloom as to the disposal of which he had entire control.

But the Judicial Committee and the High Court agreed in rejecting this doctrine. They recognized that religious belief is not stationary, and that it is not in the Vedas, but in the epics, the Purānas, the Tantras, and the lawbooks that the modern Hindu finds the essence of his religious practices laid down. If the Vedic Indian, like his Iranian cousin, was indifferent to idols, the epic already bids men provide in their houses painted images of the house deity and worship them with incense, flowers, perfumes, food and other enjoyable things, promising the inestimable boon of children to the obedient. Here we have the germ of the idea fully recognized in Hindu law, the real personality of the idol as opposed to mere symbolic significance. If an image be duly consecrated with the rites enjoined in the Tantras, then it becomes a real being, in which dwells the divine spirit, and, like all beings, it is capable of ownership of property. Jadulal's father, when he consecrated the image of Radha Shamsunderji and included it in the inventory of his property, had no

intention of dealing with a chattel; on the contrary, he was dedicating property to and for the benefit of the deity, recognized as a legal entity to which a dedication might be made, and Jadulal himself acted on precisely the same view in his further dispositions in favour of the idol.

The point of difference in the views of the Judicial Committee and the High Court arose regarding the mode of securing due respect for this personality of the image. The Committee recognized that, under the arrangements in force, the idol had not been represented in the Courts by any impartial custodian intent only on expressing the wishes of the deity, based on the interest both of himself and of the members of the family entitled to worship, including the four daughters of Jadulal, to whom no share in the management of the worship has been allotted. The legal custodians were clearly incapable of voicing the will of the deity in view of their conflicting interests, and the Committee accordingly directed that the case should be reconsidered, the idol being represented by a disinterested next friend appointed by the Court, and the female members of the family being made parties, with a view to the framing of a scheme for the continuance of the family worship. A deity is not an infant, but his spokesman will, as in the case of the custodian of an infant's estate, have to perform the duty of recommending such a course of action as may best accord with the dignity and honour of the god and the interests of his worshippers. The Court will control, if need be, his interpretation of the wishes of the god, but, no less than he, it will aim to secure that the result shall be such as may be deemed most adequately to express the will of the deity, even should it conflict with the expressed wish of Jadulal. The logic is perfect, granted the premises, which none of the beneficiaries could or doubtless would contest.

A. Berriedale Keith.

Arbitration in Commercial Contracts.—In his opinion, given to the Secretary of State for Foreign Affairs of the Republic of Cuba, Dr. S. Gutierrez de Celis sets out his reasons for thinking that, in the existing state of the law of Cuba, it is not practicable for the Republic to sign the Protocol prepared by the League of Nations, though he urges a change in the law so as to enable this to be done. It was, of course, well known that this difficulty would have to be met in many other countries besides Cuba, for the law in most countries which follow the Spanish law is much the same. The initial difficulty arises from the fact that a general agreement to refer cannot be enforced except by way of an action for damages for non-fulfilment. The next arises from the fact that only differences which have already arisen can be made the subject-matter of a reference, for this has to be contained in a notarial instrument which must set out the details required by the laws of procedure, in default of which the reference is void. Also it is not clear, so it is said, whether the Protocol, in speaking of arbitrators, means those who have to determine according to the law, being in substance a Court of Justice, from which an appeal

lies, or the amicable adjusters who, in these countries, are not subject to legal forms and who decide according to their honourable knowledge and understanding. Perhaps attention to the functioning of the lay Commercial Courts will suggest a solution.

WYNDHAM A. BEWES.

International Academy of Comparative Law.—The first session of the International Academy of Comparative Law, established at Geneva in 1924, was held at The Hague, from July 31 to August 4, 1924. There were present, Professor Weiss (Paris), President; Professors Levy-Ullman (Paris), and Balogh (Kaunas), Secretaries; Professors Lyon Caen (Paris), Altamira (Madrid), Bustamente (Havana), Wang (Peking), Oda (Kyoto), Naber (Utrecht), Hammarsjöld (Upsala), Wieland (Basle), Munroe Smith (Columbia), Scott (Harvard), Anzilotti (Rome), Jenks (London), Lee (Oxford), Walton (Cairo), and Goadby (Jerusalem). The session opened with a well-attended public meeting at the Palace of Peace, over which M. Heemskirk, Minister of Justice in the Netherlands Government, presided. After an introductory speech by M. Heemskirk, discourses were delivered by Professor Weiss on the Function of Comparative Law and the importance of its study, by Professor Levy-Ullmann on the Organization and Working of the Academy, by Professor Balogh on International Efforts towards the Codification of Private International Law, and by Professor Lyon Caen on the Unification of Commercial Law.

Further election of members included Professor Naber (Utrecht), Professor Petrazycki (Warsaw), Professor Lee (Oxford), and, as corresponding members, Professor Altamira (Madrid), Professor Cornil (Brussels) Professor Escarra (Peking), Professor Matos (Guatemala), Professor Odo (Kyoto), Professor Stang (Oslo), Professor Takayanagi (Tokio), and Professor Wang (Peking).

The Academy resolved that, for the future, its centre of affairs should be at The Hague, in order to emphasize and strengthen its connexion with the Permanent Court of International Justice.

Schemes for future work included the production of a Comparative History of Law, and of a Legal Vocabulary which would determine precisely the equivalent legal terms employed in French, German, English, Spanish and Italian. Commissions for these purposes were appointed. Steps were also taken towards the compilation of a collection of decisions of the Supreme Courts of the principal countries relating to Private International Law, and to other matters involving comparison between different legal systems, as also of a collection of the decisions of the Permanent Court relating to the same subjects. An annual volume will be published containing contributions by the members of the Academy dealing with the progress of Comparative Law and comprising special studies of interest to comparative jurists.

F. M. G.

Immigration in the Argentine.—The article which will attract most attention in the April number of the *Revista de Sciencias Jurìdicas y Sociales* (La Plata) is devoted to the subject of immigration (by Dr. Juan Carlos Rébora, Professor in the La Plata University). Argentina has been exceptionally well disposed to the immigrant, to the extent of treating him substantially as if he were a natural of the country and with little or no discrimination between the classes of immigrants whether on the ground of race, health or character. One result of this has been that vast numbers have failed to become Argentines, although their children born in that country are necessarily Argentines. These children, however, are regarded in general as also subjects of the countries of their fathers' origin, which not only creates confusion, but has tempted some European Governments to claim them as subject to compulsory military service, and has given rise to the proposition to establish racial immigration in the form of colonies—both being results to which the Republic objects. The author sketches the gradual history of the abolition of all religious difficulties which prevented inter-marriage, a step so necessary for attracting permanent population, and gives the numbers of inhabitants in 1914 as 7,903,662, 30 per cent. being still foreigners. Statistics are also given of infant deaths, of extra-matrimonial births, etc.

Italians exceed Spaniards by about 100,000. Foreigners, even where in a minority, exceed Argentines as owners of land and house property. General approval is given to the restrictions on immigration imposed since the war with the object of obtaining only persons of good health and character; but suggestions are made that persons who propagate doctrines inimical to the State should be excluded.

WYNDHAM A. BEWES.

International Review of Agricultural Economics, Oct.-Dec. 1924, Jan.-March, April-June 1925.—If there is a clear issue in Europe to-day, it is the fact that the industrial factor in society is becoming more and more chaotic and unbalanced in its working, while the agricultural factor is revealed as the essential and fundamental basis of human organization. France to-day, with her franc in a state of high fever, is yet in the happy position of having scarcely an unemployed person within her boundary, while England, with a stable pound, is living (or dying) on doles and threatened industrial crises. There are many wise people who are beginning to see the cause of this paradoxical difference in the fact that France is still, in the main, an agricultural peasant State, while England is dependent on manufacturing for export.

This agricultural quarterly comes from Rome, where the King of Italy was wise enough to found a great Institute of Agriculture, while men who called themselves "statesmen" were (throughout the world) wasting their time on party politics. There is scarcely a more useful journal published than this most excellent Review of the administrative and economic side of agriculture. In the numbers now before

us, there are invaluable articles on such matters as the "Agrarian Policy in Soviet Russia," "The Co-operative Movement in Roumania"; "House Colonization in Germany"; and "The Recent Agrarian Policy in Italy and the Problem of Latifundia." There are in these articles, as well as all the many shorter reports and notes, hints that might do more good, if applied in England, than two-thirds of the Acts of Parliament that our politicians present to their ungrateful country. Yet how many of our Members of Parliament will read these pages?

This Review should be peculiarly interesting to the readers of *The Journal of Comparative Legislation*, because it gives the necessary data for a comprehensive view over the varied social experiments in this kind of legislation and administration throughout the world. It is beyond the scope of this note to consider the technical details discussed in the articles of this agricultural journal; it can only be pointed out that the agriculturalists have here offered to the lawyers a most important and interesting problem, namely, how to translate the everyday practice of the farmers into the necessary legal forms which will give it permanence and make it work smoothly. G. S. T.

Forms of Marriage.—Dr. Baty writes, in reference to Professor Berriedale Keith's note (*Journal of Comparative Legislation*, Third Series, vol. vi, part iv, p. 198), as follows:

Although correspondence does not form a feature of the *Journal of the Society of Comparative Legislation*, I should like to be permitted, by your courtesy, to raise a point on the masterly contribution of Professor Keith to the November number. On page 199 the contention that "consent of parents is among the forms of marriage" has, I think, often been too broadly stated and too broadly accepted. In reality, in most of the relevant cases, the consent in question has been one which, *by the observance of certain Forms*, it would have been possible to ignore even in the country of the domicile. The only conspicuous exceptions are the case of *Ogden* v. *Ogden* (1908, P. 46), when sufficient attention was not paid to this aspect of the matter, and an Irish case of *Steel* v. *Braddell* (Milw. 1). In *Simonin* v. *Mallac* (2 S. & T. 67) a marriage solemnized in England between French domiciled persons was held valid, because it might, after the drawing up of an *acte respectueux*, have been validly solemnized in France without the consents normally required by French law. In *Compton* v. *Bearcroft* (2 Hagg. Cons., 430, 443), and in *Grierson* v. *Grierson* (*ibid.*, 86, 98), domiciled English persons who could have married in England without parental consents by using a certain form were admitted to have been validly married in Scotland, where they needed no such consents.

Mr. Dicey was of opinion that the law is now firmly settled that consents are indiscriminately matter of form. But, apart from the shadowy authority of *Steel* v. *Braddell*, there is only *Ogden* v. *Ogden* to cite for it. One is not even certain whether the judges in that case might not have repudiated the force of the personal law altogether, in the case before them—that of a foreigner marrying an English lady in England. And *Casdagli* v. *Casdagli* (overruling *Tootal's Trusts*) shows that a decision inconsistent with principle

may stand long years before receiving its quietus in the highest tribunal. Dicey further thought that the anomalous doctrine in question was the product of the desire of English judges to reconcile the principle of *Compton* v. *Bearcroft*, upholding "Gretna Green" marriages, with the new principle, developed about the middle of the nineteenth century, according to which the personal law was accepted (as in *Brook* v. *Brook*), as decisive on matters of capacity. This could only, he says, be accomplished by treating consents of parents, illogically, as matter of form. It is singular that he should pay no attention to the alternative explanation advanced in the clearest terms by Westlake, that in the Gretna Green cases the consents (as in *Simonin* v. *Mallac*) *were* matters of form, because even in England, by the observance of particular forms, consent could have been dispensed with.

Neither Dicey, the Court of Appeal in *Ogden* v. *Ogden*, nor any other authority that I know of has ever answered Westlake; and one is fain to conclude that the point still remains open for decision. If it should be ruled by the House of Lords or in the Privy Council, that the logical principle is law, according to which a consent which can be dispensed with by the observance of forms is matter of Form, while a consent which cannot be dispensed with is matter of Capacity, all that such a tribunal would have to do would be to overrule *Ogden* v. *Ogden*.

Compulsory Insurance in Respect of Third Party Risk.—The British public are becoming more and more alarmed at the ever-growing statistics of death and injury resulting from the revolution in road transport wrought by the coming of the motor-car; and, since it is the fact that the only legal remedy open to the victim of a motor-car accident is a common law action against the alleged negligent driver, who may or may not be able to pay the damages and costs awarded to a successful plaintiff, the suggestion is sometimes heard that all drivers of motor-cars should be required to insure themselves in respect of their liability to their possible victims. But, although in 1920 the Holman Gregory Departmental Committee on Workmen's Compensation recommended compulsory insurance in respect of workmen's compensation risk, compulsory insurance found no place in the Workmen's Compensation Act, 1923, nor did the House of Commons display any particular interest in that aspect of the question. The prospect of the institution of compulsory insurance for motorists in this country seems accordingly somewhat remote.

In the United States of America, however, as appears from an interesting article by Mr. Robert S. Marx, in *The Columbia Law Review*, for February 1925, the matter has entered the region of practical politics. And no wonder! "The total fatalities for the first nine months of 1924 already exceed 14,000, according to the National Automobile Chamber of Commerce, with 2,100 deaths reported for October 1924," and "it is calculated . . . that more than 425,000 persons received disabling injuries in automobile accidents last year." The resulting social loss, as manifested in families deprived of breadwinners and industries deprived of workers, must be immense. And all the time 75 per cent. of automobile drivers are, it is alleged, uninsured. In the ranks of the

uninsured are apparently found most of the financially irresponsibles. New Jersey has accordingly appointed a commission " to investigate the question of compensation for personal injuries or death resulting from the operation of motor vehicles, for the securing of payment of compensation therefor, and requiring motor vehicle owners to be insured."

Other States have taken similar action, while bills providing for compulsory compensation insurance are before the Legislatures of Massachusetts and New York.

Compulsory insurance with a private insurance company, however, is regarded by Mr. Marx as only a partial remedy. There is " the necessity of fighting a well-financed and highly organized insurance company, equipped to defend to the limit a personal injury suit." They " induce claimants to make settlements for inadequate sums rather than take the risks of bringing a legal action to obtain their rights." Moreover, the statement is made respecting the casualty companies doing business in Ohio that " of the seventy-seven million dollars received in premiums from automobilists, two-thirds was paid out in dividends, commissions, salaries, etc., and only one-third was paid to the injured or the dependents of the dead." These considerations lead Mr. Marx to the conclusion that the only satisfactory remedy is compulsory insurance with a State Fund on the lines of the various State Funds existing in America to which compulsory premiums are paid in respect of workmen's compensation risk. If this method were applied it is calculated that " a premium of eight to twelve dollars per car would be ample to cover the cost of compensation insurance, as against the present average rate for private liability insurance of thirty-four dollars per car." Moreover, just as in industry there is a growing conception of the principle that it is more profitable to all concerned to spend money on the prevention of accidents than merely on compensation to the victims, so state insurance of automobile risk " would bring the entire accident problem under the control of the State, and enable the State to bar the reckless and the physically and mentally unfit drivers from the streets, and to adopt scientific safety measures."

Mr. Marx's article illustrates in a striking way the distinction which, as we in England are beginning to realize in a groping way, must be drawn between, on the one hand, life insurance, and insurance against loss by the insured, fire or burglary insurance, for instance, and, on the other hand, insurance in respect of liability to third parties, of which workmen's compensation and motor-car risks are the outstanding examples. There is a strong case for compulsory insurance in respect of the latter ; there is no such case in respect of the former. And, if the State imposes compulsory insurance, the State is morally and logically bound to take steps to see that insurance is provided on the cheapest possible terms. State control of such insurance, in a greater or less degree, is the inevitable result. It is arguable that the State is under a like duty when it imposes legal obligations involving a moral duty to insure even though compulsory

insurance is not imposed. In Great Britain, where the obligation on employers to insure in respect of workmen's compensation risk is still a moral one only, the position resulting from appreciation of the distinction indicated above has been accepted by the tariff insurance companies doing workmen's compensation business, to the extent that, without legislation, they have given a voluntary undertaking to the Home Office, under which, of every £100 received from employers for premiums in respect of workmen's compensation risk, £60 is to be paid away in compensation, the remaining £40 having to suffice for expenses and profits.[1] The burden on industry is thereby substantially lightened. A similar scheme is hardly likely merely for the purpose of lightening the burden of motor-car insurance. But, if compulsory insurance were imposed on motorists by the State, the State would be under the obligation to control the rates of insurance. "Compulsory insurance for motorists, lower premiums and complete indemnity for the victims of motor accidents," would be an attractive side-line for politicians. C. M. K.

Protection Internationale des titres au porteur perdus ou volés.— M. Bezard-Falgas, in his article in the monthly *Bulletin* of the Société de Législation comparée, raises some interesting questions concerning lost or stolen securities to bearer, and makes suggestions for international legislation and action.

He deals with his subject under two heads: (1) losses attributable to war or warlike operations, and (2) losses occurring in time of peace. As regards both classes of losses, he argues that the position of the debtor, *i.e.* the person liable to pay the amount of the bearer security or the interest thereon, must be determined by the law of the debtor's domicile. But he is chiefly concerned with the conflicting rights of the person who has lost the security and the person who has subsequently become possessed of it. He points out that the underlying theories of English and French law are in opposition. According to English law, honest acquisition for value confers a good title as against the loser. According to the French theory, the loser retains his rights. In effect, the delivery of a bearer security operates much like the transfer of a cheque to bearer marked "not negotiable." As regards war, he refers to the Law of 1915 without quoting it. Apparently, if the loser complies with certain formalities his title remains indefeasible, and he indicates his preference for the French rule.

As regards stolen securities in time of peace, M. Bezard-Falgas suggests that all civilized nations should tighten up their penal laws. It should be a crime to receive in any country securities known to have been stolen in another country, and the offence should be an extraditable offence. He mentions incidentally that before the enactment of the Larceny Act, 1896, London was the happy home of receivers of stolen securities. That Act, which is now repealed and reproduced in section

[1] See Parl. Paper Cmd. 1891.

33 of the Larceny Act, 1916, punishes anyone who knowingly receives any property which has been stolen abroad, or obtained by any means which would amount to an offence in England. It would be interesting to know what country or city has now succeeded to the former position of London, or whether the receiver of stolen property has now become a cosmopolitan worker. He then goes on to suggest the institution of an International Gazette in which lost or stolen securities should be advertised, with the effect that, as long as the advertisement appeared, no one could acquire a good title to them as against the original owners. Whether this suggestion would be commercially beneficial is mainly a matter for the commercial community. An English lawyer, perhaps, would say that no one is obliged to take securities to bearer unless he likes. If a man invests in securities to bearer, he must take them with their disadvantages as well as their conveniences. If he wants to be safe, he should protect himself by insurance. M. D. CHALMERS.

Commercial Law in Cuba.—In *Cuestiones de Derecho Positivo*, Dr. Santiago Gutierrez de Celis, Consulting Advocate of the Chamber of Commerce of Cuba, has published, through the firm of Ricardo Veloso of Habana, a body of his opinions on commercial matters referred to him by the Chamber from 1920 to 1923. Unusual as such publications are in this country, they, in such a case as this, have the undoubted advantage of bringing to the knowledge of the mercantile world in a compact form the solutions of many living and practical difficulties which are met by men of commerce with frequency. Many are concerned with Cuban taxation, but others are of more general interest, such as those which concern bills of lading, bills of exchange, and numerous other matters.

The latter part of the book is devoted to the consideration of the Banking Bill, drafted by the author and Dr. Cosmo de la Torriente, a copy of which accompanies the volume. WYNDHAM A. BEWES.

Administration of Justice.—It is officially announced that, in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any part of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislatures of Norfolk Island, the Northern Territory of Australia and the Territory of New Guinea have made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland and the High Court in Ireland, and Orders in Council have accordingly been issued extending Part II of the Act to the above-mentioned Territories.

The operation of the Orders in Council is confined to England, Scotland and Northern Ireland, and similar provision has not yet been made in the Irish Free State.

NOTICES OF BOOKS.

LEGISLATIVE FORMS FOR COLONIAL USE.[1]

THERE must be many concerned with the drafting of ordinances, and with legal administration in the dominions overseas, to whom Mr. Alison Russell's *Legislative and Other Forms* will be useful. The author, who is Chief Justice of Tanganyika Territory and was formerly King's Advocate in Cyprus, is well equipped for knowing what such a book should contain. As its title implies, some of the forms are of an executive rather than legislative character; there are specimens of death warrants, remissions of sentence and pardons; there is a skeleton of an Attorney-General's legal report on proposed legislation; and there are forms of Governor's assent to, or reservation of, an ordinance.

The more strictly legislative forms are clearly drawn, with plenty of paragraphing and sub-paragraphing, and with occasional foot-notes of value. One of these notes, containing the necessary reminder that short titles should be short, gives a few warning examples of short titles which are long: Mr. Russell begins his black list with the English instance (criticized by Sir Courtenay Ilbert), "The Fisheries (Oyster, Crab and Lobster) Act (1877) Amendment Act, 1884," and ends it with one which we cannot help quoting: "Whereas His Highness the Kabaka, by and with the advice of the Lukiko, resolved to enact a law entitled 'The Law for the people who do not pay their taxes before the end of the year for which it is due, 1910.'"

The book is not unduly copious. Apart from the forms and the occasional notes, it contains no general statement of the principles of drafting. In an Appendix Mr. Russell adds some brief hints on the preparation and printing of revised editions and annual volumes of colonial legislation. Their object—to make the law accessible in an orderly form—is one which the Colonial Office has powerfully promoted and which the readers of this *Journal* will cordially commend.

CECIL T. CARR.

PRINCIPLES OF BRITISH CONSTITUTIONAL LAW.[2]

NEARLY two centuries ago Montesquieu, coming from a country where all authority was concentrated in the hands of a monarch, was much struck

[1] *Legislative and Other Forms.* By Alison Russell. (1924: Butterworth & Co.)

[2] Being a Short Study of the Functions and Mutual Relations of the Executive, the Legislature, and the Judiciary; by Cecil S. Emden, M.A., of the Middle Temple, Barrister-at-Law. (Methuen & Co., Ltd., 8vo, pp. xx + 222. Price 7*s.* 6*d.* net.)

by what appeared to him to be the "separation of powers" which characterized the British Constitution. He saw, or thought he saw, in the Government established at Westminster an Executive controlled by the King, a Legislature dependent on a popular electorate, and a Judiciary recently emancipated (by the Act of Settlement), from subordination to both. The famous chapter of his *Esprit des Lois* in which he displayed his discovery, and demonstrated the importance of the separation of powers for the preservation of liberty, had a profound effect in determining the form of the American Constitution and in moulding the institutions of Revolutionary France. Montesquieu's observations were, as a matter of fact, far from accurate. The separation of powers in Britain was not nearly so complete as he supposed. As Mr. Emden conclusively shows in the book before us, the eighteenth century saw the Legislature established as the dominant partner in the British Constitution: it performed, by means of private Acts, many of the functions proper to the Executive; it increasingly supplanted the King in the control of the Cabinet; it exercised the ultimate authority over the whole judicial system.

Mr. Emden's main thesis is that, after the passing of the Reform Act of 1832, that condition of things changed. The gradual democratization of Government restored independent authority to the Executive, so that at the present time, the Ministry, supported directly by the popular will, dominates Parliament, initiates legislation, determines finance, controls policy, and generally exercises sovereign power.

Mr. Emden presents us with a lucid and valuable analysis of the functions of the three great organs of government. He points out, with admirable clarity, which are the functions proper to each of the three, and then shows how, in Britain, for historical reasons, no sharp logical differentiation has ever taken place between them. Since Legislature, Executive and Judiciary all originated in a single undifferentiated *Curia Regis*, it is no matter of surprise that Parliament retains remnants of both judicial and administrative functions, that the Executive on occasions both legislates and judges, and that the Judiciary makes as well as maintains law. Mr. Emden's careful and comprehensive exposition of the powers of Parliament, Cabinet, and Courts in Britain, supported as it is by copious references to recent statutes and cases, makes his book an extremely useful one to students both of law and of history.

It may be doubted, however, whether he has proved his main contention. The most controversial chapter in the book is undoubtedly the parenthetical Chapter VII in which he discusses "the question of predominance," between legislature and executive. We may admit all that he says concerning the recent encroachments of the Ministry upon the prerogatives and privileges of Parliament, and may yet maintain that Parliament's power to dismiss a ministry at any moment, and its ability to pass legislation imposing any restrictions on the executive which it may desire, leaves it in that position of incontestable supremacy in the constitution to which such jurists as Bagehot and Dicey bore eloquent testimony.

Whether or not, however, one accepts Mr. Emden's arguments on this matter, there can be no doubt that he has produced a work of sound scholarship and high value.

F. J. C. Hearnshaw.

AUSTRALIAN CONSTITUTIONAL DEVELOPMENT.[1]

Dr. Kerr's treatise, orginally written as a thesis for the LL.D. of Adelaide, has had the advantage of complete revision consequent on the epoch-making decision in the *Engineers' Case*, already noticed in this *Journal*[2] which negatived the doctrine of the immunity of instrumentalities, on which the jurisprudence of the Commonwealth seemed to be securely based. With the passing of that doctrine the interpretation of the Commonwealth Constitution has ceased to be founded on American federalism and has become, in Dr. Kerr's phrase, national or Australian, or, in the more general sense, British, for the attitude of the High Court is now essentially that of the Privy Council when it dissociated itself from the doctrine. Though in itself the change of outlook is doubtless for the best, it must be recognized that it has introduced a distinct element of uncertainty into the law of the Commonwealth, and that much time will probably pass before the full implications of the new doctrine are made explicit. There are, of course, strong objections to abrupt alterations of principles of interpretation, but it must be remembered, on the other side, that excessive rigidity is a serious defect in a country which is rapidly expanding, and in which new problems, unforeseen by the framers of the Constitution, constantly arise, and it is probable that in the future jurists will cite with approval as proofs of the flexibility of the common law the course of interpretation of the Commonwealth Constitution.

Examination of the course of judicial treatment of the Constitution as set out by Dr. Kerr leaves a very definite impression that the decision which left to the High Court the final interpretation of the Constitution has justified itself. At their best, no doubt, the decisions of the Judicial Committee reach a height of excellence not attained in the Commonwealth, and the solitary pronouncement of the Committee is much more impressive than the elaborate and often conflicting judgments of the High Court. But the issues which have to be decided are such as may best be adjusted locally; the existence of racial elements of distinct origin, which in the case of Canada has rendered the Privy Council of special value, has no parallel in the Commonwealth, and it has probably been for the best that imperial political relations have never been seriously troubled by resentment of Privy Council judgments. If any general fault can be found with the judgments of the High Court it is one of excessive technicality; this has hampered the interpretation of the Commonwealth power to

[1] *The Law of the Australian Constitution.* By David Kerr, M.M., LL.D. (Australia: The Law Book Co. of Australasia, Ltd. Pp. xlvii + 382.)

[2] Third Series, vol. iv, pt. i. pp, 107, 108; vol. v, pt. iv, p. 278.

legislate for conciliation and arbitration (pp. 179 ff.), and has led to the unfortunate declaration (p. 240) that an artificial person is not to be regarded as included in the term "resident" of a State. On all these matters Dr. Kerr's treatment is helpful and suggestive, as well as up to date.

A. Berriedale Keith.

CRIMINOLOGY THROUGH INDIAN EYES.

It is always interesting to note the effect of the impact of Western ideas on the Eastern mind. A book consisting of thirteen lectures, being the Tagore Law Lectures, delivered in 1920, was published in 1924.[1] The learned author, Professor Pillai, defines the subject of Criminology as one branch of "the scientific study of crime, which, in order to be complete, must be subjective as well as objective. The latter side is treated in Criminal Law and Jurisprudence, and it is the former aspect that is the subject of special study in modern criminal science." Criminology, therefore, is the study of the subjective side of Criminal Law, the law itself being mostly objective. The subject is a very wide one, and includes all the sciences which deal with the causes of crime, and therefore, with the possible means of the prevention of crime and the reformation of the criminal. The learned author has laid under contribution, as causes of crime, physiology, psychology, morals, sociology, politics, and economics; he discusses Insanity, Feeble-mindedness, Physiognomy, Phrenology, Neurasthenia, Hysteria, Cretinism and Epilepsy in connexion with them. He is an ardent admirer and disciple of Lombroso, though he fully admits that the hypotheses of that eminent Italian thinker and writer upon the subject "have met with strong criticism," of late years "in Germany, France, England and other European countries." He ranges over a vast field of knowledge, including Indian philosophy and the special circumstances and causes of crime in India. The book strikes one as being at once too large and too small. It is too long for a mere introduction and too small for a complete treatise, which would require several volumes. It is somewhat diffuse in style, and would have gained greatly by compression. Probably it suffers from the fact that it was delivered in the form of lectures. It will appeal more strongly to Indian students than to English. At the same time, it cannot be denied that it contains a large amount of good work, the result of wide reading and of clear and subtle thinking, and it shows very strongly the effect of European ideas and views upon the mind of a thoughtful and learned Indian lawyer.

G. G. A.

[1] *The Principles of Criminology*. By K. Subrahmania Pillai, M.A., M.L., Advocate, Tagore Law Professor in the Law College, Madras. Author of *Lectures on the Indian Penal Code*, Madras, 1924.

PRIVATE INTERNATIONAL LAW.[1]

THE fifth edition of Foote's standard work has been remarkably well prepared. Since 1914, when the last edition was published, important problems have arisen which have increased out of all proportion the judicial decisions and statutory enactments. This has necessitated the restatement of the general law on the subject and the rewriting of new sections on Nationality, Bankruptcy, Corporations and on the numerous other questions of private international law considered under their modern aspect. A new chapter has also been added on domicile in non-Christian States, on foreign currency and on the effect of the Soviet legislation on Russian private companies as determined by recent case law. In the treatment of all these subjects Dr. Bellot has continued with admirable success the aim of the learned author, which was " to construct the framework of private international law, not from the *dicta* of jurists, but from the judicial decisions in the English Courts." The work, as now brought up to date, supplies a long-felt want and is bound to prove of great assistance to the practising lawyer and the student alike.

The *Précis de droit international privé,* by Professor Arminjon, of which the first volume has just appeared, deals with the subject from a different point of view. It is an exposition of the theory and science of the law rather than an illustration or comment on judicial decisions. Most of the generally accepted doctrines on the theory and practice of private international law are severely criticized by the author, although he is not always quite definite as to the solution which, in his opinion, ought to prevail. To take just one instance, the author is opposed both to the Anglo-American criterion of domicile and to the continental test based on nationality, but he fails to expound a general system applicable to the determination of conflicts of law.

The work shows remarkable research and labour and will be particularly welcome to the specialist.

C. J. COLOMBOS.

SECURITY AGAINST WAR.[2]

THIS book is a heavy indictment of the League of Nations, written from the point of view of the American Committee for the Outlawry of War, of which the Hon. Mr. Levinson is chairman and Senator Borah a leading spirit. It is well documented throughout, and a very detailed account

[1] Foote's *Concise Treatise on Private International Law.* Fifth Edition, by Dr. Hugh H. L. Bellot. (London : Sweet & Maxwell, 1925. 35*s.* net.)

Précis de droit international privé. By P. Arminjon. Vol. i, *Les notions fondamentales.* (Paris : Librairie Dalloz, 1925. Fr. 25.)

[2] *Security Against War.* By Frances Kellor, with the collaboration of Antonia Hatvany. Vol. I, International Controversies; Vol. II, Arbitration, Disarmament, Outlawry of War. 1924. (New York : Macmillan. 8vo, viii + 435 pp., 436–851 pp.)

is given of nearly all the disputes, thirty-seven in number, that have arisen during the last six years. In every case examined the decision reached is impugned. The author has confined herself to the settlement of the disputes, though this hardly represents 10 per cent. of the work of the League, which it has done through its commissions. The Council of the League is regarded throughout as the passive instrument of the Conference of Ambassadors, that is, of the allied and victorious Powers, and the Assembly as somewhat of a nonentity. This criticism is to lead up to the main thesis of the book, that what is needed is a Court and nothing but a Court, and that we should make a return from Geneva to The Hague.

It is true that the League has not accomplished or been able to accomplish all that it hoped in the matter of " disputes " and " minorities," and that neither party to the several disputes is satisfied with the decision made. But the latter fact is *prima facie* evidence of impartiality. It is interesting to compare this book with Professor Arnold Toynbee's *Survey of International Affairs*, and his *World after the Peace Conference*. After pointing out the indisputability of the gains to the cause of nationality brought about by the League, he comes nearest to admitting as well as answering the author's position in the following passage :

" The Devil's Advocate could show another side of the picture. He could present a list of entire nationalities still submerged, and of substantial minorities unredeemed. He could cite instances to prove that the Peace Conference had meted out one measure to the victors and another to the vanquished, and he might argue, with some plausibility, that the gains had been cancelled by the losses, and that the general effect of the settlement had been to reverse the positions of ' top dog ' and ' under dog,' without altering their relations or reforming their behaviour. No doubt there would have been a considerable element of truth in this contention. The possibilities of a just and generous settlement were evidently prejudiced by the immediate background of a bitter and exhausting war, and even more by the vista of domination and oppression which stretched back for centuries behind the war of 1914. The political atmosphere of Eastern Europe, in particular, could not be purified instantaneously by drawing fresh lines on a map. All parties alike had breathed it in for generations, and all would, therefore, continue to show the pathological effects of the contagion for some time to come. The first impulse of a nation just released from duress is to behave like the Unmerciful Servant towards its weaker neighbours, and especially towards its former masters. Indeed, a nation suddenly enabled to indulge the instinct of domination after long repression will usually take greater advantages than a nation satiated by a long enjoyment of power. In the light of these commonplace psychological facts, it appears remarkable, not that the Peace Conference was guilty of flagrant anomalies and injustices in dealing with particular national issues, but that it attempted to work on an abstract principle, and that it was successful, on the whole, in putting this principle into practice."

In other words, it is impossible to doubt that, but for the Covenant and the League, the terms imposed on the vanquished would have been

immeasurably harsher than they actually were. But it is equally true that the League was hampered by the Treaty. There was a logical contradiction between the two. Ideally, the League should have been born in the piping times of peace ; but, in such times, inertia would only have produced a feeble offspring such as The Hague Conferences of 1899 and 1907, to which we are urged by the author to return. It required the devastation of the war to give rise to something stronger than a Court that, at need, could be quietly disregarded. The aim of the Covenant was to ensue true peace ; but a treaty of peace, that puts an end to hostilities, in spite of its name, is not, as the author supposes, an act of peace. Wars are waged solely in view of the treaty that shall conclude them ; the battles and so on are but means subordinate to this end ; the treaty embodying the imposition of the will of the conqueror on the conquered is the act of violence *par excellence* ; it is the résumé of the whole war. To disregard this, to make the League act retrospectively as if there had been no war at all, was impossible ; it had to accept the fact of the war and what that implied, and then to bend its efforts to mitigate its effects, as far as possible. By a resolution last year, it has pronounced aggressive war an international crime. Can it say more ? There is no special talismanic virtue in the phrase " outlawry of war."

To take two examples of the Council's work, the cases of Danzig and the Aaland Islands, which the author criticizes so unfavourably, we can see the great difficulties presented, but which are here ignored—difficulties not only of political adjustment, but of juridical principles still undetermined. Danzig had been under Polish suzerainty for many hundreds of years, and the Poles were deeply disappointed that the city had not been ceded outright to them. But the position in 1918 was that, of the inhabitants of Danzig, only 3 per cent. were Poles, and the remainder Prussians ; but it would be hard to say how far this disproportion was not the result of Prussia's treatment of the Poles, her enforced settlements, her ruthless suppression of the Polish national spirit and the Polish language. Between the ancient claims of Poland and the rights of the present possessors what international juridical principle of " prescription " could have been invoked, if the matter had been referred to a Court ? In the Common Law of England and the United States there is no prescription for a criminal offence, and for ordinary torts prescription varies from one legal system to another, and within the same system.

In the Aaland Islands case the main charge brought against the Council is that it disregarded the wishes of the inhabitants—that is, the principle of " self-determination." But " self-determination," though it will claim deep respect, is not an absolute principle ; against it must be set that of organic and natural unity—a principle not so easy to determine as the other, but not less concrete and actual ; in fact, many thinkers would say it was more real, just as it was more refractory to exact definition, like the concept of justice itself. By the Americans, " self-determina-

tion " was successfully asserted in their War of Independence, and no less successfully defeated in their Civil War. The status of Aaland Islands was settled by a commission consisting of a Belgian, a Swiss, and an American jurist, and, while reporting that the sovereignty of Finland over the Aaland Islands was incontestable, they laid down a principle of great general importance in rejecting the Islanders' claim to self-determination : " To concede to minorities, either of language or religion, or to any fractions of the population, the right of withdrawing from the community to which they belong, because it is their wish or good pleasure, would be to destroy order and stability within States and to inaugurate chaos in international life ; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity." But, though the author quotes these words, she still adds, " there was sacrificed the aspiration of a little people to self-determination, because the entrance to the Gulf of Bothnia is more important than the happiness of the people who occupy the islands." The author finds fault also with the Council's decision in this case, as being inconsistent. The sovereignty was awarded to Finland, and yet there was an interference with that sovereignty in the securing of special rights of language and local autonomy, etc., for the inhabitants. Such a decision, it is true, a legal Court could not have given, but it can hardly be disputed that, from the point of view of equity, *ex æquo et bono*, the decision was excellent.

And this leads naturally to the second volume, which is concerned with the juridical aspect of the problems and with the constructive proposals of the authors and the American Committee already referred to. The important articles of the draft of this committee (p. 782) are " (5) a juridical substitute for war as the method of settling international disputes shall be created (or, if existing in part, adapted and adjusted), in the nature of an International Court, modelled on our Federal Supreme Court in its jurisdiction over controversies between our sovereign States . . . . (6) The jurisdiction of the Court shall not extend to matters of governmental, domestic or protective policy. . . . The classes of disputes excluded from the jurisdiction of the International Court shall be specifically enumerated in the code. . . . (7) War must be disallowed before the International Court is given affirmative jurisdiction over the disputes of the nations, just as the power to engage in war among our States was, under Article I, s. 9 of our Constitution, given up by our States before they clothed the Supreme Court with jurisdiction over their disputes." In brief, the American Constitution is to be applied to the whole world ; and, indeed, a plan so simple and so attractive and that has—with one momentous exception—worked so well in a great federated country, is bound to be considered with the greatest respect. But its success in the United States has been due to very special conditions : a population homogeneous in culture and ideals, and an intense spirit of legalism. The latter is perhaps due, as Dicey pointed out, to its inheritance of the Common Law, " the most *legal* system in the world, if the phrase may be allowed " ;

but it has also been further developed by, as it was the original cause of, that unique position of the Supreme Court which is ultimately sovereign in the United States by its power of declaring void any act of Congress, or of the State Legislatures. It might, therefore, be plausibly argued that if the American system has had this desirable result of engendering such a loyalty to law that it "can acquiesce in the finality of possibly mistaken judgments," why not apply it to the rest of the world? The answer would be that we have to provide for the immediate present, and that it will be long before such a spirit of legalism, based alone "on the sanctions of good faith," will be developed among nations whose historical traditions are so different. And we must not forget that it was even a United States President, namely, President Jackson, who said: "John Marshall has delivered his judgment; let him now enforce it, if he can"; and the judgment was not enforced. But on other grounds we would regret this plan of a Court and nothing but a Court, with a sharp demarcation between "justiciable" and "non-justiciable," to be settled from the start by a code. We are here dealing with some very live issues. England, at the moment, is hesitating or refusing to accept compulsory arbitration even in "justiciable" questions, as hitherto recognized. And how a matter of domestic jurisdiction, *i.e.* non-justiciable, is to be defined is far from clear. Hitherto we have had to be content with a list, or schedule of instances. In this connexion we would refer to the articles in the recently published *Year-book of International Law* by Professors Baker and Brierley. We find, again, Secretary Kellogg, in his recent address, using the phrase "*requiring* China to fulfil her obligations of *sovereignty*," where the two words italicized are obviously contradictory. It will be just on "non-justiciable" questions, on questions of domestic jurisdiction that grave and serious tension will arise, which, *ex hypothesi*, a Court cannot deal with. Did not Japan herself complain, rightly or wrongly, that if her nationals were murdered in the United States, the offenders were either not prosecuted or were acquitted by the juries? It is possible that the world may before long agree to refer all minor disputes to a Court, but what is to happen when serious friction arises over a matter that has been classed as "non-justiciable"? The Supreme Court did not save the United States from her Civil War, the momentous exception referred to. Indeed, it might be argued that the rigidity of the American Constitution, though so effective ordinarily, was through a supreme crisis the very cause of that War. The argument at this point requires further developing. Our contention is that the American system, where the judiciary is ultimately sovereign, is, in spite of its general success hitherto, anomalous in that it makes no provision for the law of inevitable change. A Court can only interpret existing rules, but neither a legal system, nor even a constitution, can remain stereotyped. There has always existed some agency or instrument for transcending the claims of legalism, to instance only the Roman prætor's fictions, which were

political in the sense that they were non-legal, or our early Chancellor's Court, and modern legislation. Given a Court, and nothing but a Court, what is to be this agency which is to supply that equity, that "rectification of the law," as Aristotle says, "where it fails through its universality," or in other words, through its logical rigidity? Of course, in the United States that modification to meet changing social needs is brought about by political legislation in all spheres—except in the matter of the Constitution itself. But it is just this Constitution itself, without any political body attached, that our author and the American committee wishes to be taken over for the federation of the world. In the League we have just that political body which will be the instrument to meet the necessities of change, which can be interpreted as bridging the gap where the "claims of justice transcend those of pure legalism," or of bridging the gap between "justiciable" and "non-justiciable" matters. The whole issue is quite simple if a Court can only deal with "justiciable" matters, but if it is probable that the gravest conflict of interests will arise in "non-justiciable" matters, there must be something beyond a Court and a Code to avert the danger, and attain "Security against War."

H. Bull.

HINDU CONSTITUTIONAL LAW.[1]

The growth of interest in India in political reform is responsible for the appearance of a large number of works dealing with the history of Indian political thought and organization. There is much that is interesting and of permanent value in this intellectual movement, but in part it is adversely affected by the desire to discover the presence in India of political institutions of a more democratic type than have generally been believed to have existed there. Mr. Jayaswal was in some measure a pioneer in this field, and his elaborate treatise on *Hindu Polity* has distinct merits. It is based on a wide study of the original authorities which it renders conveniently accessible; it displays much ingenuity and power of imaginative construction; and its speculations often deserve serious consideration from expert investigators of the subjects with which it deals. But the student of comparative politics would be ill-advised to accept its conclusions as presenting anything approaching an assured basis for the reconstruction of our conceptions of early Indian political institutions. Mr. Jayaswal has allowed himself to be persuaded that republican constitutions of a truly democratic character were common in early India, and he finds (i. 92) this recognized as early as the *Aitareya Brāhmaṇa*—that is, comparatively early in the Vedic period. Unfortunately, this rests on a misconception of the term Vairājya, which he treats as meaning "the kingless state," whereas the meaning is plainly merely that in certain regions the title taken by a ruler was Virāj; if doubt were

[1] *Hindu Polity*. By K. P. Jayaswal. (Calcutta: Butterworth & Co. (India), Ltd., 1924. Pp. xxxii + 219 + 277.)

possible, it would be dispelled by another passage in the same text (viii. 15) which gives the form of oath when a Kshatriya, *i.e.* man of the ruling class, is consecrated for Vairājya. There doubtless existed certain republics in India, but Mr. Jayaswal has failed to find any substantial indication of their mode of government; in some cases it was clearly, as the Greek authorities record, aristocratic, and it is impossible to say how far the quasi-democratic form of government of the Buddhist religious congregations really corresponds to a similar phenomenon in the political world. The silence of our authorities is not favourable to the belief that voting by ballot and orderly discussion, with the will of the majority prevailing, were normal features of Indian policy.

Mr. Jayaswal similarly is bent on idealizing Indian kingship; it was, he claims (ii. 38), a human institution, elective, contractual, an office of state, a trust, not arbitrary and not above the law. These views he assigns, not, as might be done with some justification, to late Brahmanical speculation, inclined to diminish the importance of royalty, but to the Vedic coronation ceremony and popular belief. It may suffice to point out that not only is the whole conception an anachronism, but the assertion that the king is subject to the law rests on a mere mistranslation of a passage in the *Çatapatha Brāhmaṇa*. In the ceremony of consecration the king was beaten, doubtless to expel evil, but the *Brāhmaṇa* (v. 4, 4, 7) interprets the rite as rendering him immune from punishment—a statement misinterpreted by the author as asserting that he is subject to punishment. Similarly, it is largely due to a mistranslation of a passage in the *Arthaçāstra* (i. 15), that the author asserts (ii. 117) the obviously amazing doctrine that the Hindu king was bound to act on the advice of his ministers. It is clear that, as he had the unquestioned right of appointment and of removal, it would have been absurd that he should be bound by his own nominees, and in fact that text merely provides that the king should act on the advice of the majority of his ministers or take the course which he deemed best after hearing his ministers. Mr. Jayaswal supports his misinterpretation by placing credence in a legend reported four or more centuries after Asoka's death, which represents that monarch as being opposed, though not overridden, by his ministers; in the authentic edicts of Asoka himself no hint of this is found; on the contrary, the Emperor appears as acting essentially on his own authority and conferring such powers on his subordinates as he held fit. Nor is there any real evidence for Mr. Jayaswal's belief (ii. 79) that in Hindu kingdoms there existed assemblies of the city people and the country people, which were consulted by the sovereigns and whose consent was necessary for taxation. What is shown by his evidence is simply that petty kings, at any rate, had in their actions to consult the feelings and the interests of their people; of the existence of assemblies there is no trace. Such liberty as existed in Indian government was exhibited in the local and communal sphere, not in the wider political area. Finally, it must be noted that the author's ascriptions of dates to

his authorities is not to be accepted without great hesitation ; in special the *Jātakas* are not evidence for the sixth century B.C., and, despite an elaborate argument, the *Arthaçāstra* is not a contemporary treatise describing the constitution of the India of the Mauryas.

A. BERRIEDALE KEITH.

RECENT LEAGUE OF NATIONS LITERATURE.

THE growth of interest in the League of Nations, apparent from the increased space given to it in the public press, is shown also by the extent and character of the literature springing up, which deals with different aspects of the League and its work. This is illustrated by a batch of publications now before us.

First, we have two pamphlets by an American, Mr. Manley O. Hudson, Professor of International Law at Harvard Law School. One is reprinted from the *American Journal of International Law*, and deals with the Registration and Publication of Treaties (under Article 18 of the Covenant). The other is reprinted from the *Harvard Law Review*, and deals with the Amendment of the Covenant (under Article 26). Both are careful, elaborate and painstaking studies of the special subjects presented. In the first we are made acquainted with the steps which led up to the insertion of Article 18 in the Covenant, and the action taken by the League to give effect to its provisions. Article 18 has given rise to many difficulties of interpretation. These are fully explained and discussed, and we are told in detail what the League has done by way of seeking to remove them. It is of interest to note that, under this Article, up to March 1, 1925, as many as 829 international engagements of one kind and another had been registered with the League.

The second pamphlet deals with the subject of "Amendment of the Covenant," on very similar lines, but in a still more studious and exhaustive manner. The history of the insertion of Article 26 in the Covenant is narrated, and the difficulties of interpretation, which have cropped up in this case also, are discussed. A full account is given of the various amendments that have been proposed from time to time in different articles of the Covenant, and of the subsequent course of proceedings on each proposal. Article 26 requires that amendments, before taking effect, must be ratified by all the States composing the Council of the League, although, as regards the other States, ratification by a majority of the whole number of members of the League is sufficient. Apart from certain verbal amendments consequential on the establishment of the Permanent Court of International Justice, and an amendment providing that the expenses of the League shall be borne by the members in proportions decided by the Assembly (instead of in the proportions prevailing in the Universal Postal Union), all the amendments so far brought forward appear to have failed, either to secure acceptance by

the Assembly, or else to pass successfully through the mill of ratification under Article 26.

Among the abortive proposals enumerated is the important amendment to Article 10, put forward by the Canadian delegation at the 1922 Assembly, as to the means of fulfilling the undertaking given by the members of the League to preserve, as against external aggression, the territorial integrity and existing political independence of all members. The Canadian amendment sought to provide that the advice which Article 10 requires the Council to give, in case of any aggression, "shall be regarded as a matter of the highest importance, and shall be taken into consideration by all the members of the League, which shall use their utmost endeavours to conform to the conclusions of the Council; but no member shall be under the obligation to engage in any act of war without the consent of its Parliament, Legislature or other representative body."

The next publication we have to notice is a pamphlet published by the League of Nations Union entitled, *The Place of the Empire in the League of Nations*, written by Professor A. Berriedale Keith, D.C.L., D.Litt. It discusses, in a concise and illuminating manner, the changes which have gradually been developing in recent years in the constitutional relationships between Great Britain and the self-governing Dominions, and the difficult and important problems raised by the inclusion of these Dominions and India, in addition to the British Empire, as separate members of the League. As the author truly remarks: "The creation of the League has intervened to affect in a manner whose consequences are still incalculable the normal development of the constitution of the Empire, and to create problems which can be solved satisfactorily only by the most prudent statesmanship based on a wide realization throughout the Empire of the true character of the questions involved." After examining the subject from various points of view, he comes to the conclusion that "it would be unjust to attribute to the Covenant any definite tendency to break up the cohesion of the British Empire," and that "its provisions regarding the Empire tend to secure for the Dominions and India an opportunity of developing individuality and national sentiment and acquiring international recognition of these qualities, without derogating vitally from the essential unity of the Empire."

We take up, next, the annual volume of *Transactions of the Grotius Society* for 1924,[1] which contains a variety of matter concerning the League.

It opens with a paper by Sir Alfred Hopkinson, K.C., on "America and the League of Nations," and an address by Lord Charnwood on "The Relation of the United States to the League of Nations." In both the reasons for the abstention of the United States from membership of the League are discussed. Both agree that the main obstacle to the entry of the United States is to be found in Article 10 of the Covenant

[1] *Problems of Peace and War*, vol. ii. (London: Sweet & Maxwell, Ltd. Pp. xxi + 188. Price 7*s.* 6*d.* net.)

and the obligation resting on members of the League to join in the use of force. Sir Alfred Hopkinson expresses the view that "the League might work quite effectively without the obnoxious articles if the United States joined it, and there would be nothing to prevent arrangements being made if thought fit to use naval or military forces in any given case, when it arose, to prevent oppression or outrage, if any of the Powers who were in a position to act agreed to do so at the request of the League." He thinks that "the best results will come from the habitual association of the nations co-operating in some useful work for the benefit of all. Solid friendship for nations as well as individuals naturally springs from association in some definite positive work for the common good."

In another paper Mr. G. P. Gooch, Litt.D., discoursing on "The German Mind since the War," has a passage dealing with the attitude of the German people towards the League, and gives his views as to the conditions which need to be fulfilled in order to induce Germany to apply for membership.

Baron A. Heyking, D.C.L., Ph.D., writes on the subject of "Some Defects in the Protection of Racial and Religious Minorities." He sees great flaws in the armour at present provided for protecting minorities, and suggests that the difficulties lie not so much in the fundamental principles underlying the minorities' rights, as framed in international treaties and declarations since the war, as in their practical execution and enforcement. He pleads for considerable improvements in the League's procedure in order to ensure impartial adjudication upon complaints submitted on behalf of minorities and effectual prevention of oppression. "The justification for the existence of the League of Nations," he says, "is to be looked for in the maintenance of peace, the central pivot of which is the solution of the burning question of the minorities, a problem urgent and pressing in the world of to-day."

In another paper, Mr. Herbert F. Manisty, K.C., deals with "The Effect of the Protocol and Covenant," and raises detailed criticisms upon several of the provisions of the Protocol. In the discussion following this paper Sir Alfred Hopkinson, who was in the chair, made some observations on the subject of the sanctions provided by the Covenant for enforcement of League obligations. In one passage he said: "With regard to the question of sanctions, one of the things which has been rubbed in is that there have been 700 arbitrations in recent years, and not in one serious case has there been any attempt to break the rule. If we could have a clean-cut agreement to go to a certain tribunal—everyone agreeing to it—we need not trouble about any sanctions."

Besides these papers concerning the League of Nations, the Grotius Society's volume contains several other papers, of which two, on the subject of "The Legality or Illegality of the Ruhr Occupation," are specially interesting. One of these, by M. Frederick Allemés, presents the arguments pointing towards legality, and the other, by the late Dr. E. J. Schuster, K.C., the arguments pointing towards illegality.

The remaining publication in the batch before us is a second edition of Sir Geoffrey Butler's *Handbook of the League of Nations*.[1]

The original edition of this Handbook contained a short description of the nature, constitution and historical antecedents of the League. It was written shortly after the signing of the Versailles Treaty, and before the deposit of the ratifications brought the League formally into existence, an introduction by Viscount Cecil of Chelwood (reprinted in the new edition), being dated November 1919. The original matter is now revised, with the object of bringing it up to date, and supplementary chapters are inserted dealing with the proceedings of the League during the first five years of its existence. A further chapter is added on the relation of the League scheme to present and earlier theories of national sovereignty, and there are several valuable appendixes, which occupy 127 out of the 239 pages of which the book consists.

The first appendix contains a chronological summary of the principal events and proceedings in connexion with the League, down to March 1925. The second is a bibliography of official publications and books dealing with League matters. The third is the text of the Covenant, followed by a list of the members of the League at October 1924, and the official commentary on the Covenant issued by the British Government at the start of the League. The next contains the Statute of the Permanent Court of International Justice, its Rules, the names of the States that had, at the date of the book, ratified, and those that had signed, but not yet ratified, the protocols accepting (*a*) the jurisdiction of the Court, and (*b*) the optional clause for compulsory jurisdiction, the text of the resolution of the Council of the League as to the terms for admission to the Court of States outside the League and not mentioned in the Annex to the Covenant, a list of the first judges of the Court, and a statement of the remuneration of the judges. The last two appendixes contain the texts of the draft Treaty of Mutual Assistance and the Geneva Protocol.

It is clear that the League is still immature and incomplete, but the widening and deepening of public interest in it, to which these several publications testify, gives us increased confidence that the present generation will successfully discharge the task lying before it of making the League an effective substitute for all war and a medium for understanding and co-operation between all nations.

F. N. KEEN.

THE MANDATORY SYSTEM.

DR. J. STOYANOVSKY, in his recent work,[2] endeavours, in a spirit of idealism, but with a solid backing of arguments and facts, to reinterpret the mandatory system. His views rest in large measure on an ingenious

[1] London: Longmans, Green & Co. Pp. xvi + 239. Price 10*s.* 6*d.* net.

[2] *La théorie générale des mandats internationaux.* By J. Stoyanovsky. (Paris: Les presses universitaires de France, 1925. Pp. 251.)

discussion (pp. 68–86), of the question of the sovereignty in respect of mandated territory. He dismisses the views that sovereignty resides in the League of Nations as the mandating power, and he rejects the opinion of the Supreme Court of the Union of South Africa, with which Mr. Matthews has made us familiar,[1] and which recognizes a species of sovereignty, conferring on the Union such a measure of authority as justifies the assertion of the existence of the crime of high treason. His own view ascribes sovereignty to the people of the territory in each case, the exercise of sovereign powers, however, being provisionally confided to another power, as trustee for the real sovereign, under the terms of the mandate accorded by the League of Nations. He looks forward, therefore, in the case of all the mandated territories, to an ultimate state in which each will emerge as a sovereign State, and he will not admit that there is in principle any distinction to be drawn between the cases of mandates such as that for Iraq, and mandates of the "C" class. He resents strongly the suggestion of M. Rolin that in some cases, at least, mandates are merely cloaks for annexation, and he finds it necessary, therefore, to lay it down (pp. 115, 116), that it is within the power of the Council of the League, by a unanimous vote of all its members save the Power affected, to revoke a mandate if the conditions of its exercise are violated. The reasoning is ingenious, but it may be feared that it does not represent very closely the intentions of the framers of the Covenant of the League or the actual results of their work. The author himself recognizes (p. 128) that the Covenant and the mandates concede neither to the League of Nations nor to the people of the territories any power of obtaining from the Permanent Court of International Justice a ruling on the rights of the mandatory under the mandate; moreover, the League has no coercive power whatever over the mandatory, nor, strictly speaking, have the inhabitants of the territory any right to petition it, though this has been permitted under conditions (pp. 146–51) which render the practice innocuous to the mandatory. In essence as opposed to form, the case rather is that the mandatory powers exercise sovereign rights, subject to the obligation of affording information to the League and permitting discussion and criticism of their actions by the Permanent Mandates Commission and the League, and to the necessity of accepting the judgment of the Permanent Court on any matter of dispute referred to that body by another member of the League. The value of publicity need not be underestimated; it is well that attention should be drawn in Britain and Australasia to foreign views of the exploitation of Nauru and the control of the former German territories in the Pacific, and that the action of the Union Government in South-West Africa should be submitted to impartial review. But it would be idle to suppose that the League regards as the ultimate end of the territories included in the "B" and "C" mandates any sort of independence; in the case of the Union, it has set its seal of approval of ultimate merger in the Union by

[1] This *Journal*, Third Series, vol. vi, pt. iv, pp. 245–50.

permitting the wholesale conversion of the German settlers into British subjects, a decision (pp. 94, 95) which definitely rules out any idea of training the natives to become masters of their own destiny. Dr. Stoyanovsky supports the decision of the Council on the score that the terms of Article 122 of the Treaty of Versailles would have justified the expulsion of all German settlers, so that conversion into British subjects was an equitable fate; but he ignores the inevitable result on the future of the territory arising from this decision. He advocates (p. 154), as the Mosul Commission of the League has done in a more complete and effective form, the exercise of local supervision by representatives of the League; but it is clear that, on incontrovertible legal grounds, he would not have supported the Commission in their decidedly advanced views as to the functions and authority of the League even in respect of so anomalous a case as that of Iraq. It is interesting to note that he revives (p. 156) in a less disputable form the old suggestion that the effective carrying out of the terms of the mandates should be encouraged by the periodic despatch by each mandatory of a parliamentary commission to examine on the spot the manner in which the mandate is being executed. There is, it must be owned, some truth in the argument that it is difficult for officials trained in colonial government to adapt their methods and ideals to the conditions of mandatory government; nor is this attitude furthered when the Governments themselves consider the mandates rather as annexations on onerous conditions than as the undertaking of solemn trusts.

A. Berriedale Keith.

A SKETCH OF THE HISTORY OF INDIA FROM 1858 TO 1918.[1]

Professor Dodwell has performed a notable service to students of modern India and of the problems which its government presents. Under a title which, taken in conjunction with the external appearance of his volume, leads one to expect an uninspiring school primer of historical facts, he has compressed into a small compass a remarkably full and well-informed exposition of the forces, moral, political, administrative and economic, and the reactions to them, which have been moulding the relations between India and Great Britain since the Mutiny and the consequent assumption of government by the Crown. The opening date of this sixty-year period forms a sufficiently obvious landmark; and few, whether they agree or disagree with the policy indicated in the Montagu-Chelmsford Report of 1918, will cavil at Professor Dodwell's assertion that that Report "marks a decisive epoch in the modern history of India," and that it is "comparable with the Company's decision of 1771 to 'stand forth as Diwan' which Mill truly recognized as marking a revolution." He would be a bold man who would attempt

[1] *A Sketch of the History of India from* 1858 *to* 1918. By H. Dodwell. (London: Longmans, Green & Co. 1925. Pp. xi + 326. 6*s*.)

to foretell the results of the new policy, and it is no part of Professor Dodwell's plan to make such an attempt. But any guidance through the maze of problems which will tax all the statesmanship of both countries during the next sixty years is to be welcomed, and this book affords guidance of a kind not readily available.

Professor Dodwell's analysis of the salient features of his period has led him to assign three principal errors to administrative policy in India : (1) a failure to recognize the direction in which the forces of political growth were moving and to define the goal towards which those forces should be directed ; (2) the growing inclination of the Secretary of State, not indeed to govern India, but to interfere with the government of India ; and (3) the failure to enlist India's support by associating Indians more nearly with the higher form of Government, coupled with a tendency to prefer the employment of English to Indians in the name of efficiency. And he states briefly his reasons for believing that the new policy has marked the end of these errors. It would be truer, perhaps, to say that it has made it possible to end them. The declaration of policy embodied in the famous Preamble to the Act of 1919 was a conditional declaration, and so long as either party to what was, in effect, a bilateral agreement tends to insist rigidly on its own abstract rights and to scrutinize the shortcomings of the other party, so long will " the progressive realization of responsible government in India " remain an idealistic vision.

The most valuable portion of Professor Dodwell's sketch is his lucid and accurate description of the machine of government in India and the way in which it works. It would be a mistake to infer, from the picture which he presents, that the familiar rôle of the Indian civilian " District Officer "—so often alluded to as the backbone of British rule—is entirely a thing of the past. The standpoint of high politics from which Professor Dodwell necessarily approaches his subject tends to place in the background the humbler instruments and tasks of day-to-day administration ; and, while much of the contents of this book would be hardly less informative to officials who have spent long years in the business of government in India without coming into immediate contact with Simla and Whitehall than to persons who have never set foot in the country, there can be no doubt that stress is rightly laid on the political aspect of the problem, for it is that aspect which will inevitably dominate the relations between ths two countries in the future ; and an accurate appreciation of the governmental machine as it was when the new policy came into play and of the steps by which its then form was constructed is an essential requisite to intelligent appreciation of the potentialities of reconstruction.

From the point of view of this *Journal*, the chief interest of the period lies in the slow but steady development of the legislatures in India from their original form of meetings of the executive " for the purpose of making laws," with the addition for that purpose of a small accretion of non-official and official members, into parliaments endowed with most of the usual attributes of legislative assemblies, and—most important

change—dominated by overwhelming elected non-official majorities. Professor Dodwell shows how soon the earlier executives tended to assert—usually unsuccessfully—their independence, in their capacity as legislatures, of external control and dictation. It lay beyond the scope of his book to indicate the extent of the real independence from such control (and indeed from the control of their own executive partners), which the new legislatures have inevitably acquired through their elected majorities, despite the legal powers vested in the executive of overriding an adverse vote. Apart from the political consequences of this drastic change, its immediate result has been a vast increase of legislative output and a noticeable deterioration in the form of Indian—and particularly of provincial—Acts. Before 1920 practically all provincial Bills were subject to elaborate scrutiny by the highly skilled draftsmen of the Legislative Department of the Central Government, and it was, generally speaking, within the power of the provincial executive to avoid inconvenient amendments. Since that date these conditions, with the increased independence of provincial Legislatures, have largely lapsed, but it was beyond the power of the provincial government to create, by a stroke of the pen, a staff of draftsmen immediately competent not merely to deal without external assistance with their own Governments' official measures, but to assist the Councils in getting into reasonable shape the crude efforts of amateur but none the less undaunted non-official members. This reflection is, however, a somewhat far cry from Professor Dodwell's valuable and stimulating book.

RECENT DEVELOPMENTS IN INTERNATIONAL LAW.[1]

Professor Garner's Tagore Law Lectures are really a history of modern International Law, with the main emphasis placed on the period since the beginning of the present century. "What I have endeavoured to do," he says in the preface, "is to discuss the actual interpretation and application of the law, as well as its development, to signalize the divergencies of opinion and of practice which have prevailed and which still prevail among States as to what the law is or should be, to indicate the principal tendencies which have characterized the recent history of International Law, and to venture some observations on the probable future lines of development in the light of new and rapidly changing conditions." The fifteen lectures contained in the book treat of (1) Recent and Present Tendencies, (2) the Hague Conventions, (3) the Declaration of London, (4) Aerial Law, (5 to 8), the Interpretation and Application of International Law in Recent Wars, (9) the Treaties of Peace (1919) and International Law, (10) Arbitration, (11) Other Agencies of Peaceable Settlement, (12) International Legislation and Organization, (13) the International Court, (14) Codification, (15) Reconstruction.

[1] *Recent Developments in International Law.* By James Wilford Garner. (Tagore Law Lectures, 1922. Calcutta: University Press. Pp. xii + 840. 1925.)

There is nothing in the book except the title to suggest oral delivery, and it is in fact a treatise containing an enormous mass of information, well-documented and lucidly arranged. It is, moreover, I believe, the only book in English which even attempts to cover in a comprehensive manner the whole recent history of International Law. This is a great achievement, and one for which, in this age of periodical literature and monographs on particular topics, Professor Garner deserves the thanks of all international lawyers.

Professor Garner's main purpose was evidently to narrate; and of the narrative side of his work it is difficult to say anything except that it is admirably full, accurate and clear. Inaccuracies seem to be extraordinarily rare; but it is perhaps worth pointing out that the Anglo-American pecuniary claims commission has not yet rendered awards in all the cases submitted to it, but is still in session from time to time (p. 503), and that the Portuguese Government is referred to where, apparently, the Greek Government is intended (p. 528). But Professor Garner is too good an historian and political scientist ever to allow himself to become a mere annalist, and there will naturally be more difference of opinion as to some of his judgments on past, and his estimates of probable future, development. The present reviewer can only indicate a few of the points upon which he would like to break a lance with the author. It seems, for instance, to be a dangerous statement of the *rebus sic stantibus* doctrine to say that "any party has a right to demand a release from its engagements whenever the original conditions under which they were entered into have undergone such fundamental changes that the continuance of the obligations would result in hardship or retard the development of the State" (p. 46); and surely we must regard the declaration of the London Conference of 1871, for what it was worth, as an out-and-out repudiation of the doctrine of *rebus sic stantibus*, instead of reading it as impliedly subject to the application of the doctrine, as Professor Garner would do.

Professor Garner, again, seems to me to give insufficient weight to the strength of the objections which are urged against the codification of International Law. It is, for instance, doubtful whether his statement (on p. 763), that the practicability of codification has been demonstrated by the considerable measure of codification already achieved in the laws of war will be generally assented to; it is quite possible to draw a precisely opposite moral from the work already done in that field. Further, the fact, if it is a fact, that countries which have codified their own municipal law have not found codification to interfere with the development of the law (p. 765), affords very little evidence of the probable effect of a code on International Law, where the practical difficulties of revising a code, once achieved, would be almost as great as the difficulties of originally achieving it.

But a more immediately important matter is Professor Garner's general attitude towards the laws of war. It is surely not true that

"it is generally admitted that the need of codification of the laws of war is more urgent than the codification of the law of peace" (p. 766). On the contrary, there is probably a growing feeling that the value of past attempts to regulate the conduct of war has been very small, and almost a consensus that those attempts ought not, at present at any rate, to be renewed. That the League of Nations should be entrusted with such a task (p. 772) is indeed a most unacceptable prospect. For even if it is true, as Professor Garner thinks, that law can do something to make war less barbarous than it otherwise would be, the overwhelming objection to the course he proposes is that it inevitably fosters the dangerous feeling that war is something normal, something that, however unwelcome, we must expect to recur from time to time. How easy it is to slip into such an attitude towards war is illustrated even by Professor Garner's last lecture, which bears the title of "the Reconstruction of International Law," but in fact is almost entirely limited to a discussion of "the modifications that seem to be desirable or necessary in consequence of the new and changed conditions under which wars in the future will be carried on." But even if international lawyers are likely to continue to disagree on the question whether the legal regulation of war is worth attempting at all, can we not at least agree that, since the interest and the energies of which International Law can dispose are so manifestly insufficient for the magnitude of its tasks, they can, for an indefinite time to come, be more usefully directed to the improvement of the hopelessly backward law of peace, and so to the rendering of future wars less probable than they otherwise might be? Indeed, one of the strongest impressions that Professor Garner's own narrative leaves on the mind is that of the enormous improvement in the prospects of developing the law of peace that has taken place even during the short period of years with which he deals. One has only to compare his description of the attitude of the States at The Hague Conferences, boggling at the faintest suspicion that they might in any way be obligating themselves to the peaceful settlement of their differences (*e.g.* pp. 477, 574), with that of their obligations undertaken in the Covenant (pp. 634–5), to realize that a veritable revolution in political thought has already taken place, and that it affords an unprecedented opportunity for the advancement of the International Law of peace.

J. L. Brierly.

HISTORICAL FOUNDATIONS OF TRADE MARK LAW.

This book[1] is put forward as the first of a projected series of Legal Studies to be published under the auspices of the Columbia University of New York. It takes the form of a dissertation by the author as his qualifying thesis on the occasion of taking his degree of Doctor of Laws, and apart

[1] *Historical Foundations of Trade Mark Law.* By Frank I. Schechter, A.M., J.D. (New York: Columbia University Press, 1925. Pp. xxviii + 211.)

from this academic object it has been written, we are told, with the aim of tracing the sources of trade mark law and analysing its present state and tendencies in the light of its history. An account of the provenance of the work is not immaterial to a review of it for the simple reason that it explains much which would otherwise be difficult to understand, and in particular the point of view of the author, which is hardly that of the practical lawyer on the one hand or the antiquarian student on the other hand. The antiquarian element does indeed preponderate, as is perhaps both natural and right in the case of a book written by a student in the course of his academical work. But the material collected is dealt with in a manner which commends itself to lawyers rather than to antiquaries, with the result that it is difficult to classify the book as either law or history. It is fully intelligible only when it is considered as a diploma work.

Among the points raised for discussion in the treatise two are of special interest, namely, the question how far trade marks conform to the nature of property and what is the legal principle upon which relief is given to the owner of a trade mark who complains of the infringement of his rights. They are closely connected both logically and in the history of the subject, but the connexion is not very clearly brought out in these pages. Dr. Schechter does indeed quote recent judgments to show that the Courts have taken divergent views and laid down principles which do not form a very consistent whole. But the explanation of these divergencies will be sought for in vain in these pages, and the criticism which is in fact bestowed upon the authorities quoted does not go far towards removing the difficulties which are pointed out. In criticism, indeed, the author of this book does not show to advantage, and it behoves the reader, when his author is most magisterial, to stand most upon his guard. A striking case in point is the criticism to which Lord Hardwick's judgment in *Blanchard* v. *Hill* is subjected. The importance assigned to this decision in these pages seems disproportionate, for, in fact, its bearing upon the law of trade marks is inconsiderable. It was an application for an injunction laid upon a Royal Charter, and it was refused on the ground that the Charter itself appeared of doubtful validity and that an injunction could not be granted until the question of validity had been tried. It is a decision which would be followed in *consimile casu* by any Court to-day. The facts that a perpetual injunction was asked for in that case in circumstances which at most would be held to justify an application for an interim injunction to-day, and that no case of urgency, but only one of privilege under a patent grant, was put forward in support of the application, seem to have escaped Dr. Schechter's notice, so that he comments on the case in such terms as these: "We return to a consideration of the reasons impelling Lord Hardwicke to deny emphatically—indeed, almost indignantly—the first recorded request for injunctive relief against trade mark piracy," and then he proceeds to extract from the judgment, not the *ratio decidendi*, which we have given

above, but a dictum in which the judge dismissed an unproved suggestion that the use, by another tradesman, of a mark which the plaintiff was authorized to use, but not proved to have used, would injure his trade. A vague suggestion of that sort, made at the bar but unsupported by evidence, would be dismissed by any Court to-day, with as little ceremony as Lord Hardwicke observed in dismissing it in 1742; but it is upon this inadequate ground that Dr. Schechter is prompted to write: "The decision in *Blanchard* v. *Hill* is difficult to understand" (p. 135).

It is with better warrant that our author writes of the "difference of opinion and confusion" discernible in the judgments of the Courts as to the principle upon which the right of the trade mark owner to relief should be grounded. The difficulty here is undeniably connected with the peculiar nature of the right which the trade mark owner asserts, and may be raised by the question, is the right a right of property in the mark, or is it not? There was a time in our legal history when the question could have been answered easily and definitely, and the answer at that time would have been that the right was a privilege. Now a privilege is not, in the fuller sense of the word, a property, because the owner cannot part with it. Thus, the right asserted in *Blanchard* v. *Hill* was a privilege enjoyed under a royal grant, but not one that the grantee could assign away. That description would not fully cover trade mark rights to-day. For the trade mark to-day is assignable in connexion with the business in which it is used, and therefore it is, to that extent, property in the full sense of that term. But it is property qualified by the condition that it cannot be assigned in gross. It is appurtenant to the goodwill of the owner's business, and therefore it cannot be treated as an independent property. It may be very valuable, but it cannot be independently valuable, and hence arises the difficulty of speaking of a trade mark as in itself a property. A tradesman's good name, a professional man's standing, may be his most valuable possession, but a good name and professional standing are not property, for the simple reason that they are inalienable—inseparable from their one and only possible possessor. The distinction which is absolute in these cases is recognizable, although far less pronounced, in the case of a trade mark, which is inseparable from the goodwill of a business. To the mind of a lawyer it seems as inappropriate to call a trade mark a property as to call the House of Commons a Parliament. It is not that he has any difficulty in discerning the proprietary element in the one or the parliamentary nature of the other, but in each case he wants a word which connotes the limited as well as the essential nature of the connexion, he wants to speak of a possession which is appurtenant to a property and of a body that is inherent in a Parliament. The difficulty is not with the ideas, which are quite definite and easily intelligible, but with the language, which is inadequate and must be fashioned by every speaker to serve his special occasion.

Turning to the other point, we find it stated on p. 5 of this book in these

terms: "In England, and to a much greater degree in this country, Courts are endeavouring to reach a conclusion as to whether the true ground of relief is the deception of the public, or whether, on the other hand, it is the injury to the owner of the trade mark involved." Now here the distinction is not a question of words but of substance, and it is a matter of importance, because the answer to the question affects both the nature of the evidence to be considered and the extent of the relief to be afforded. Yet even this statement of the case must be qualified by the remark that the one consideration does not exclude the other, but that, on the contrary, both considerations enter into every case. There can be no injury to the owner unless the public, or some member of the public, is deceived, and if the deception is established the injury will be readily inferred. Hence in every case the using of deception or no deception must arise. It may take the form of the simple question, Has somebody been, in fact, misled? or it may take the hypothetical form, Is it probable that somebody has been deceived or even the form, Is it probable that somebody will be deceived? But, unless in some way deception is proved, the plaintiff cannot have a case. The distinction becomes of importance only when the nature of the relief comes in question. If actual deception is the ground of complaint the natural remedy is damages, but, if probable on contingent deception is in question, damages afford no sufficient relief, and an injunction must issue to restrain the infringement. Such is, broadly speaking, the course of the development of trade mark law, which Dr. Schechter traces. The strongest cases come first, in which there is actual deception and gross fraud. The element of fraud involved evokes the intervention of Courts of Equity. The growth in volume and importance of advertised businesses adds gradually, but in the end enormously, to the commercial value of trade marks, and this growth in value gives rise to statutes enacted to simplify the procedure, to render the relief more effective, and to facilitate the development of a code of internationa law upon the subject. It is along these lines that the history of trade mark law may most usefully be traced and it must be matter of surprise to the reader that this most important branch of his subject has escaped the writer's notice altogether. The references to statute law are fragmentary and in no sense historical, while the growth of an international system based on treaties is not even adverted to. These omitted matters are, no doubt, matter of recent history, but the whole history of trade mark law is comparatively recent.

The book contains much curious information and a copious bibliography very carefully compiled. It is also provided with an excellent index which renders its contents readily available. It is, therefore, valuable as a book of reference, and should find a place on the shelves of every law library which aims at completeness.

J. W. Gordon.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE.[1]

It is significant of the interest which has been aroused by the creation of the Permanent Court of International Justice that so many works and articles on it have already appeared. Mr. Fachiri and Professor Hudson's volumes have each a very different purpose, but they are both, in their own sphere, valuable contributions to the literature on the subject.

Mr. Fachiri's book, as its title indicates, deals primarily with the organization, jurisdiction and procedure of the Court, with which the author is familiar, inasmuch as he appeared before it for the British Government in the *Tunis and Morocco Nationality Decrees Case*. An introductory chapter outlines the history of the creation of the Court, and nearly one-half of the book is devoted to an account of the cases which have already been before it for decision. The Appendix contains a valuable collection of preliminary documents, such as the Draft Scheme of the Jurists' Committee and the Reports submitted to the Council and Assembly of the League of Nations in connexion therewith. Both lawyers and publicists will be grateful to Mr. Fachiri for the very clear account he has given of the Court and its working.

Professor Hudson's volume has a different aim; it is primarily intended to "educate" American opinion with a view to the participation of the United States in the work of the Court. The book consists of a series of papers which have been contributed during the last three years to various legal periodicals in the United States, or read before various bodies in that country. Four papers are occupied, together with the pamphlet, on what the Court has done, for the most part, with a review of the work of the Court during the first three years of its existence, while the remaining papers deal with the question of American participation.

The question of the compulsory jurisdiction of the Court is one of the most important matters with which Mr. Fachiri deals. As he observes, the term "compulsory jurisdiction" is, strictly speaking, inaccurate when applied to litigation between States, since there exists no superior power capable, either in law or in fact, of creating such a jurisdiction. What is really meant by the term is jurisdiction conferred once for all by a general agreement between States to submit certain classes of disputes to a particular tribunal. Compulsory jurisdiction is used to denote "a

[1] A. P. Fachiri: *The Permanent Court of International Justice: Its Constitution, Procedure and Work.* (London: Mr. Humphrey Milford, Oxford University Press. Pp. vi + 342. Price 15*s*.)

Manley O. Hudson: *The Permanent Court of International Justice and the Question of American Participation.* (London: Mr. Humphrey Milford, Oxford University Press. Pp ix + 389. Price 17*s*.) Manley O. Hudson: *What has the World Court Done?* (League of Nations Non-Partisan Association, Inc. New York.) Manley O. Hudson: *The Prospect for International Law in the Twentieth Century.* (Reprinted from the *Cornell Law Quarterly*, vol. x, p. 4.)

system whereby a number of States agree, by means of a single general convention, to confer jurisdiction in all disputes which may arise between them upon a given tribunal and to allow the reference of each particular dispute to the tribunal at the instance of either party to the dispute," whereas voluntary jurisdiction denotes a system " which limits jurisdiction to particular disputes submitted to the tribunal by an agreement made *ad hoc* after the dispute has arisen."

As is well known, the Jurists' Committee proposed to confer compulsory jurisdiction on the Court in all disputes of a legal nature which were not settled by diplomatic means, provided no agreement had been made to submit the dispute to another tribunal. This proposal was rejected by the Council, and the Court was merely given jurisdiction to entertain all disputes or cases of whatever nature, legal, economic or political, which the parties might agree *ad hoc* to refer to it, and all matters specially provided for in treaties and conventions in force, whether existing or future. The Assembly, while acquiescing reluctantly in the Council's decision, inserted in the Statute of the Court a clause embodying the principle of compulsory jurisdiction, but limiting its operation to those States adhering to the Statute which signed a special agreement accepting the compulsory jurisdiction subject to such conditions as they might severally lay down at the time of signature. This is known as the " Optional Clause."

One of the most interesting features of the Court's jurisdiction is the power to give advisory opinions on the request of the Council or Assembly of the League. Objection has been raised to this jurisdiction on the ground that it is not in accord with the judicial character of the Court. Indeed, so eminent a lawyer as Mr. J. B. Moore, now one of the judges of the Court, has described it as " obviously not a judicial function." The objection seems to be based principally on the view that the Court is merely the private Court of the League. This is, of course, quite erroneous. The Court does not derive its existence from the Covenant, although it was set up in conformity with Article 14: it is an entirely independent body in its working. Mr. Fachiri argues—as we think, conclusively—that the Court, when exercising its advisory jurisdiction, acts as a judicial body applying legal principles, and that the whole object of the reference for an opinion is to obtain a settlement on the basis of law and justice as distinguished from political expediency. He points out that in this country a special power is conferred on the Judicial Committee of the Privy Council of giving advisory opinions on any matter referred to it by the Crown; while in Massachusetts, as Professor Hudson reminds us, the practice of giving advisory opinions has prevailed since 1780, with very satisfactory results, and so recently as 1924 the Chief Justice of Massachusetts said that the advisory opinions of the judges of that State "express views resting upon judicial investigation and consideration." This fact makes it all the more surprising that the United States should object to the advisory jurisdiction of the Court; yet so strong is this feeling in

America that the late President Harding suggested that either the giving of advisory opinions should be abolished or the privilege of requesting them should be extended to any State which might require them. Professor Hudson is strongly opposed to the abolition of such advisory opinions, as he considers that they are likely to be distinct contributions to international law, and he points out that unless and until the Court has complete compulsory jurisdiction it is obviously impossible to permit any one State to approach the Court for an advisory opinion. As Mr. Fachiri says: "This branch of jurisdiction has proved in the past, and is likely to prove in the future, one of the most fertile opportunities for extending the Court's field of activity of usefulness." The attitude of the Court in the *Eastern Carelia Case* demonstrates that, in considering the giving of advisory opinions, the Court is, in the words of Professor Hudson, "a thoroughly independent judicial tribunal."

With regard to the law to be administered by the Court, which is laid down in Article 38 of the Statute, it may be observed that the Article is careful not to adopt the view, often put forward by writers on international law, that where a principle is embodied in a number of conventions it thereby becomes a rule of international law binding even upon States which are not parties to any of the conventions. It is interesting to note that both Mr. Fachiri and Professor Hudson maintain that, although Article 59 of the Statute provides that decisions are not binding except between the parties in a particular case, they will, in effect, have the force of precedents which will gradually be worked into a body of case law, and all that the reference to Article 59 in Article 38 is likely to do is to prevent the adoption of the rule of the House of Lords that previous decisions will not be overruled. In point of fact, one of the most valuable functions of the Court will be the building up of a coherent system of international law by a series of decisions commanding the support of the family of nations.

A lawyer will naturally inquire: What are the sanctions of the Court? They are chiefly, as Professor Hudson says, "the moral strength of the Court, and the moral force of the world's opinion behind it." Such sanctions are not to be regarded lightly; but, even so, material sanctions are not lacking, for Articles 12, 13 and 16 of the Covenant should provide adequate material sanctions for enforcing the judgment of the Court.

In Professor Hudson's book what will interest European readers most are the papers which deal with American participation in the Court. He is a whole-hearted supporter both of the League of Nations and of the Permanent Court of International Justice. He would like to see the United States a member of both bodies, and he does not attempt to conceal his inclination. Nevertheless, he is sufficiently versed in affairs to know that, for the time at least, the question of the entry of the United States into the League cannot be regarded as within the sphere of practical politics. He does not conceive, however, that

this should affect the question of her participation in the Court since it is entirely independent of the League. Professor Hudson pleads for such participation on three grounds. The Court is a court of justice and not merely a court of arbitration; secondly, it is in its infancy, and will require in the early years of its existence all the moral influence of the nations of the world to extend and confirm its authority; and thirdly, the United States has always been in the forefront of movements designed to secure the administration of justice in international affairs according to law. At The Hague Conference of 1907 the attempt of the American delegates to secure the establishment of a Permanent Court of Arbitral Justice was defeated by the failure of the Conference to agree on any plan for selecting the judges. And it is here that the scheme of the new Court has been so signally successful. The Court is in existence, and will go on without the United States. It is not, therefore, a question of creating a new Court; the time for that has gone. It only remains to decide whether the United States will participate in the Court or will go back on her previous history and stand outside any attempt to promote the peace of the world through the action of an international court of justice.

The United States already has the right of access to the Court, but participation in its work would involve a share in the expenses and in the election of the judges. As regards participation in the expenses—this is a small matter, and would cause little trouble. The real difficulty concerns the method of electing the judges, arising from the fact that the election is made by the Council and Assembly of the League independently from the list of persons nominated by the national groups in the Permanent Court of Arbitration at The Hague. The United States can even now participate in the nomination of candidates, since she is represented on the Court of Arbitration. In 1921 the American group declined to make any nominations; in 1923 they reversed their previous decision. This does not, however, affect the method of election as distinct from nomination, and Professor Hudson's purpose is to adumbrate a scheme which would enable the United States to participate in the election without assuming any responsibilities towards the League. He rightly observes that it is undesirable at this early stage to amend the scheme of election as laid down in the Statute of the Court. On the other hand, it would not, he thinks, be difficult to frame a new provision for insertion in the Statute which would confer on States mentioned in the Annex to the Covenant—of which the United States is one—adhering to or ratifying the Protocol the same privileges as regards the Court as are possessed by the members of the League. The objection to this course is, that it would involve an amendment of the Statute and a ratification of the amendment by all the signatory States. To avoid this difficulty, he suggests that the United States should ratify or adhere, subject to a reservation that she be admitted to participate in the voting in the Assembly and Council when those bodies act, not under the provisions of the Covenant, but as the

electoral bodies named in the Court Statute, and that by this participation she does not become in any way a party to, or bound by, the Covenant. This reservation, to be effective, would require merely the *acquiescence* of the signatory States.

As regards the form which participation might take, we are met with the perennial difficulty in American foreign politics—the attitude of the Senate, and active American participation in the Court must involve a discussion in the Senate. Professor Hudson thinks that, from the point of view of American constitutional procedure, mere adhesion to the Protocol without signature would be simpler than signature followed by ratification.

In his pamphlet on the prospect for international law Professor Hudson comments on the chance methods by which international law has developed in the past, and he looks forward to developments in the future on more considered lines. The organs for such development are now in existence—the Permanent Court of International Justice, which can make, and has already made, valuable contributions to judge-made law, and the Assembly of the League which may be expected, from time to time, to convoke conferences to deal with the regulation by international agreement of such parts of international law as may seem desirable and possible.

D. B. T.

THE RENASCENCE OF INTERNATIONAL LAW.[1]

THE purpose of this book is to give a summary of the past history and the present practice of International Law and to draw therefrom general conclusions as to future advancement.

The first part of the work is devoted to a discussion of the growth of International Law in the past. The recognition by Great Britain of the Confederate States during the American Civil War is discussed (p. 30), as a recognition of independence. It was, however, that very different thing—a recognition of belligerency. Apart from this one slip, Dr. Nathan succeeds in giving an accurate and lucid account of the origin of International Law and its development to the position which it had attained by 1914. There is not much indication of divergent views; for space forbids more than a summary statement of the legal rules with which the author deals. If, however, this earlier portion of the work had been confined to a discussion of main fundamental principles, the general reader, for whom the work is primarily intended, might thereby have received some better indication of the causes which led to the decline of International Law during the recent war. There is at least one writer who has suggested that, in the period before 1914, International Law developed too quickly and received expression in precise

[1] *The Renascence of International Law.* By Manfred Nathan, K.C., LL D. The Grotius Society Publications, No. 3. (London: Sweet & Maxwell, Ltd. Pp. ix + 218.)

rules which attached to it a certain notion of immutability at the very time when international society was undergoing considerable change. If this view be correct, it might explain much. As it is, in that portion of Dr. Nathan's work which deals with the decline of International Law during the Great War we have to rest content with a statement of those violations of International Law which are well established by evidence, and the conventional explanation of such violations by the policy of force, as exemplified in the views of Moltke, Bernhardi and others, in conjunction with the pernicious doctrine of military necessity. But surely it is pertinent to ask how the doctrine of military necessity arose. Might it not result from the fact that the laws of war were crystallized in precise rules at a time when established methods of warfare were becoming obsolete and, consequently, before an effective common basis of assent had been discovered ?

At all events, the question seems worthy of attention, for the answer to it might give a new direction to the efforts of those who, like Dr. Nathan, are seeking to discover the methods of practical reform. For the practical advancement of International Law, Dr. Nathan looks to an authoritative international tribunal, whereby the penalty attached to the infraction of recognized international rules shall be made certain and regularly applicable. But such a tribunal alone, he rightly argues, is insufficient; it is at least but the machinery for the administration of International Law; and before it can function to advantage the rules of International Law must be systematized and made uniform. To that end he advocates the production of an International Code, containing such modifications of, and additions to, hitherto existing rules as will make the system fit the conditions of the times. One may be permitted, however, to doubt the advisability of such a measure. It is common ground that more certainty on many of the rules of International Law is essential; but complete codification at the present stage might attach to the system a notion of immutability which, in the present rapidly changing condition of international society, might prove fatal. Dr. Nathan recognizes the need for growth in International Law; but his comprehensive code might militate against growth, and it is difficult to support his suggested machinery for securing necessary change. He advocates the appointment of " a permanent and officially recognized body of jurists " whose recommendations shall receive the " full authority of the law " ; and these jurists are to be appointed, not because they represent the interests of their countries, but because of their acknowledged eminence as authorities on International Law. But surely the function of the expert is consultative. A system of law which does not meet the needs of its subjects can never succeed ; and, if International Law is to change in accordance with the changing needs of the States whose interests it is to govern, how else can effective change be produced than by the work of persons directly representing those interests and working to reconcile them where they conflict ?

Dr. Nathan's book is suggestive, and stimulates thought, and even criticism. It is difficult to recall another volume in which the facts of the case are stated so concisely ; for that very reason, we feel bound to challenge some of the conclusions which Dr. Nathan asks his readers to draw from the facts.

R. A. EASTWOOD.

We have to acknowledge :

The Turco-Egyptian Question in the Relations of England, France and Russia, 1832–1841. Parts I and II, by Frederick Stanley Rodkey. (University of Illinois Studies in the Social Sciences.) Price $1.00 each part.

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The Life and Works of Hugo Grotius. By W. S. M. Knight. (London : Sweet & Maxwell, Ltd.) Pp. xiv + 304. Price 10*s.* 6*d.* net.

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The following periodicals are also received : American Bar Association Journal ; American Economic Review ; American Journal of International Law ; American Political Science Review ; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque ; Bolletino della Emigrazione ; Bulletin de la Société italienne pour les Etudes de Droit industriel ; Bulletin de l'Institut Intermédiare international ; Bulletin mensuel de la Société de Législation comparée ; Bulletin officiel du Congo Belge ; Bulletin statistique de la République Tchécoslovaque ; Calcutta Weekly Notes ; Canadian Bar Review ; Chinese Social and Political Science Review ; Columbia Law Review ; Edinburgh Review ; L'Egypte Contemporaine ; Gesetzgebung und Rechtspraxis des Auslandes ; Headway ; Hindustan Review ; Instituto Ibero-Americano de Derecho Comparado publications ; International Labour Office Bulletin ; International Review of Agricultural Economics ; International Year Book of Agricultural Legislation ; Journal du Droit International ; Journal of the Parliaments of the Empire ; Juridical Review ; La Giustizia Penale ; La Procedura Penale Italiana ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; National Municipal Review ; Rapports Judiciaires de Quebec ; Revista de Ciencia Juridicas y Sociales ; Revista de derecho jurisprudencia ; Revue de Droit International et de Législation comparée ; Revue International de la Croix Rouge ; Social Sciences Quarterly ; South African Law Journal ; Studi di Diritto Industriale ; University of Illinois Studies in the Social Sciences ; Wisconsin Law Review.